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No. 93-454

In The

Supreme Court of the United States

October Term, 1993

LOUISIANA-PACIFIC CORPORATION,

Petitioner,

vs.

BURTON BAKER,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of Idaho

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the use of a bigoted epithet, by a justice of the Idaho Supreme Court, that labels any person who crosses a picket line, a "lowly form of life," exposed constitutionally prohibited bias and prejudice that denied Louisiana-Pacific Corporation its right to a fair and unbiased hearing of its appeal in violation of its rights guaranteed by the Fourteenth Amendment to the Constitution of the United States?

2. Whether the Idaho Supreme Court's entry of a finding of fact in violation of Article V, Section 9, of the Idaho Constitution, violated Louisiana-Pacific Corporation's rights guaranteed by the Fourteenth Amendment of the Constitution of the United States?

3. Whether, after the filing by Louisiana-Pacific Corporation of its Motion to Recuse one of the Idaho justices simultaneously with its Petition for Rehearing, the Idaho Supreme Court's failure to provide the required notice and hearing, or to take any action thereon, before its denial of the petition for rehearing, violated Louisiana-Pacific Corporation's rights guaranteed by the Fourteenth Amendment of the Constitution of the United States?

LIST OF PARTIES

The parties to the proceedings below were Petitioner Louisiana-Pacific Corporation and Respondent Burton Baker.

Louisiana-Pacific Corporation does not have a parent company. Louisiana-Pacific Corporation's subsidiaries are Blue Skies Aviation, Inc., Ketchikan Pulp Company, Kirby Forest Industries, Inc., Louisiana-Pacific Corporation (W. Va.), Louisiana-Pacific Corporation de Mexico, S.A. de C.V., Louisiana-Pacific, S.A. de C.V., Louisiana-Pacific Corporation Foundation, Louisiana-Pacific International, Inc., Louisiana-Pacific Canada, Ltd., Louisiana-Pacific Trucking Company, Louisiana-Pacific Venture Corp., L-P Foreign Sales Corporation, and New Waverly Transportation, Inc. Louisiana-Pacific Corporation does not have any affiliate companies.

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Petition for Writ of Certiorari to the Supreme Court of the State of Idaho

PETITION FOR WRIT OF CERTIORARI

Petitioner Louisiana-Pacific Corporation (L-P) hereby requests this Court to issue a Writ Of Certiorari to review the opinion of the Supreme Court of the State of Idaho entered on March 11, 1993, and its order of June 22, 1993, denying L-P's Petition for Rehearing and denying all other pending matters.

OPINIONS BELOW

The order entered by the Industrial Commission[1] of the State of Idaho on June 11, 1991, is unreported (App. E, 16a-35a). The opinion of the Supreme Court of Idaho entered on March 11, 1993, is reported at ___ Id.___, 853 P.2d 544 (1993) (App.D, 6a-15a). The Order denying the Petition for Rehearing (and denying all other pending matters), which is unreported, was entered June 22, 1993 (App. A, 1a-2a).

STATEMENT OF JURISDICTION

A. Basis and Timing.

This Court has jurisdiction of this case under 28 U.S.C. § 1257(3).

The March 11, 1993, opinion of the Idaho Supreme Court resulted in L-P's timely Petition for Rehearing on March 30, 1993, (App. I, 152a-153a). Simultaneously therewith, L-P moved for an order for Justice Bistline to recuse himself (App. K, 164a-166a). The Idaho Supreme Court summarily, without comment, in the same order (App. A, 1a-2a), denied both the Petition for Rehearing and the motion seeking Justice Bistline's disqualification.

This petition for a Writ of Certiorari is being filed within ninety days from the denial of the Petition for Rehearing, on June 22, 1993.

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1. Idaho Code § 72-402, provides in relevant part, that "The references in the Idaho Constitution, Idaho Code and Idaho Rules of Civil Procedure to the "industrial accident board"... shall be deemed to be references to the Industrial Commission."

B. The Federal Questions Were Properly Presented.

Question 1, bias and prejudice, and Question 2, improper entry of a finding of fact, did not arise until the entry of the decision by the Idaho Supreme Court on March 11, 1993. These two questions were thereafter timely and specifically raised in L-P's Petition for Rehearing and in its brief in support of the Petition for Rehearing, included in Appendix I, 152a-153a and Appendix J, 154a-163a respectively.

The federal questions set forth in Questions 1 and 2 in this petition were undoubtedly properly presented to the Idaho Supreme Court.

The issue raised in Question 1, bias and prejudice, was raised by L-P in its Petition for Rehearing, and it argued in its brief that "anything less [than withdrawal of footnote number one and remand to the Industrial Commission for entry of a finding of fact] would violate . . . the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States."

The issue raised in Question 2, improper entry of a finding of fact, was raised by L-P in its Petition for Rehearing, and elaborated on in its brief where it argued: "to fail to reverse and remand, and to allow the Industrial Commission to enter appropriate findings of fact in the face of this constitutional mandate . . . would be a direct violation of Appellant's constitutional right to due process under the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States." The Idaho Supreme Court's Order of June 22, 1993, denying the Petition for Rehearing, rendered "after due consideration," clearly demonstrates that it reached the merits of L-P's constitutional challenge under Questions 1 and 2. *Aetna Life Insurance Company v. LaVoie*, 475 U.S. 813, 821 (1986).

Question 3, failure to provide notice and hearing on the

Motion to Recuse before ruling on the Petition for Rehearing, did not arise until the Idaho court denied L-P's Petition for Rehearing and simultaneously *denied all other pending matters,* of which L-P's motion for Justice Bistline to Recuse Himself from further proceedings (App. K, 164a-166a) was one. Under the process due before the Idaho court, pursuant to its own rules, the court should have provided notice, held a hearing, and then decided the Motion to Recuse prior to deciding the Petition for Rehearing. Instead, the court addressed this fundamental question, disqualification, as a mere afterthought. Had the proper procedure been followed, there would not have been a failure to provide the mandated notice and hearing.

The question raised by the Idaho court's violation of L-P's right to due process under the Fourteenth Amendment of the Constitution of the United States, because of the Idaho court's failure to provide notice and hearing on the Motion to Recuse, and because of its proceeding to resolution of the question of whether to grant the Petition for Rehearing without first resolving the disqualification question, is "so connected" with the grounds of L-P's petition for rehearing, as to form a cumulative ground or reason for alleging the invalidity of the Idaho court's decision. Jurisdiction over this question is proper. *Illinois v. Gates,* 462 U.S. 213, 220 (1983)[2].

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

1. Constitution of the United States, Amendment 14:

No state shall make or enforce any law which

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2. *Illinois v. Gates,* 462 U.S. 213, 220 (1983). In *Gates,* the court noted that jurisdiction is proper where a question presented for the first time is so connected in substance with a previously raised question as to form another ground or reason for alleging the invalidity of a lower court's judgment. *Id.*

shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; . . .

2. 28 U.S.C. § 1257(3):

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows. . . .

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

3. Preamble to the Constitution of the State of Idaho:

We, the people of the state of Idaho, grateful to Almighty God for our freedom, to secure its blessings and promote our common welfare do establish this Constitution.

4. Constitution of the State of Idaho, Article I, § 2:

§ 2. Political power inherent in the people. – All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform or abolish the same whenever they may deem it necessary; and no special privileges or immunities shall ever be granted that may not be altered, revoked, or repealed by the legislature.

5. Constitution of the State of Idaho, Article I, § 18:

§ 18. Justice to be freely and speedily administered.– Courts of justice shall be open to every person, and a speedy remedy afforded for every injury of a person, property or character, and the right and justice shall be administered without sale, denial, delay, or prejudice.

6. Constitution of the State of Idaho, Article V, § 9:

On appeal from orders of the industrial accident board the court shall be limited to a review of questions of law.

7. Idaho Code § 72-403:

72-403. Penalty for malingering - Denial of compensation. – If a partially disabled employee refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or secured for him, he shall not be entitled to any compensation. [I.C., § 72-403, as added by 1971, ch. 124, § 3, p. 422].

8. Idaho Code § 72-804:

> 72-804. Attorney's fees – Punitive costs in certain cases. – If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by an injured employee or dependant of a deceased employee without reasonable ground . . . the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission. [I.C., § 72-804, as added by 1971, ch. 124, § 3, p. 422].

9. Idaho Appellate Rules:

> *See* Appendix. (App. U, 222a-322a).

10. Idaho Appellate Rules, Rule 48:

> Rule 48. Practice not covered by rules. - In cases where no provision is made by statute or by these rules, proceedings in the Supreme Court shall be in accordance with the practice usually followed in such or similar cases, or as may be prescribed by the Court or a Justice thereof. (Adopted March 25, 1977, effective July 1, 1977.].

11. Idaho Rules of Civil Procedure, Rule 40(d):

> *See* Appendix. (App. U, 323a-327a).

12. Code of Judicial Conduct:

See Appendix. (App. U, 328a-339a).

STATEMENT OF THE CASE

A. Claim Before the Industrial Commission of the State of Idaho

This case arises out of an industrial accident and injury suffered by Respondent Burton Baker on October 21, 1982. (S*ee generally* Industrial Commission decision, App. E, 16a-35a). Mr. Baker received a full release to return to full-time work at his pre-injury job on March 1, 1983 (App. D, 7a). After the first month, he was able to fully do his work without difficulty (App. D, 7a).

Mr. Baker worked thereafter for about three months at his regular job, until June 27, 1983, when his local labor union went on strike against Petitioner L-P (App.D, 7a). Mr. Baker, at the time of the strike, served in the capacity of treasurer for the local union. Previously, he had served a three-year term as president of the Inland Empire District of the union. Mr. Baker, upon learning of the strike and the picket line, supported the union, did not cross the picket line, and participated in the picket line. His decision not to cross the picket line was his voluntary decision in support of the union. It was not because he could not perform his job (App. D, 7a).

After his refusal to cross a picket line, Mr. Baker was notified that if he did not return to work by August 22, 1983, his job would be filled. He did not respond to the letter, and, in fact, never thereafter contacted L-P about employment (App. D, 7a). Mr. Baker filed an Application for Hearing before the State of Idaho Industrial Commission seeking benefits for "permanent partial disability." L-P responded to this claim by denying that he was entitled to any partial disability benefits. L-P asserted that Mr.

Baker was not entitled to "permanent disability" benefits pursuant to Idaho Code § 72-403:

> 72-403. **Penalty for Malingering – Denial of Compensation** – If a partially disabled employee refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or secured for him, he shall not be entitled to any compensation. [App.U, 222a].

A hearing was held on October 11, 1990. The Industrial Commission found that Mr. Baker, after being fully released to return to his job and after being able to perform his job for approximately three months thereafter, refused to return to work on August 22, 1983. The Commission held, however, that Idaho Code § 72-403 did not apply in this case because it does not apply to "permanent" partial disability benefits, but rather it only applies to "temporary" partial disability benefits. (App. E, 28a).

At the time of the Industrial Commission's decision, only one Idaho Supreme Court case, some seven years earlier, had discussed Idaho Code § 72-403. In *Gomez v. Rangen's, Inc.*, 105 Idaho 337, 670 P.2d 42 (1983) (App.S, 193a-216a), the Idaho court did not reach the question of the applicability of the section to the facts because the Industrial Commission had not ruled on the issue. The Idaho court remanded that case to the Industrial Commission for it to give consideration to the statute. No subsequent decision was issued on the applicability of Idaho Code § 72-403.

In *Gomez*, however, a concurring opinion of former Justice Huntley opined that Idaho Code § 72-403, even though it specifically states "partially disabled," really only applies to "temporary partially disabled" persons and that it did not apply to "permanently partially disabled" persons. It was this language that

the Industrial Commission relied on to support its decision in this case. (App. E, 28a).

B. The Appeal to Idaho's Supreme Court

L-P perfected its appeal, from the Industrial Commission decision, on July 15, 1991. In its opening brief, L-P argued that Idaho Code § 72-403, was not ambiguous and that there was no basis to distinguish "temporary" partial disability from "permanent" partial disability when the statute quite clearly and without limitation applies to "partial disability." L-P further argued that any lost wage (partial disability benefit) suffered by Mr. Baker was not due to his injury but rather due to his own voluntary choice to not return to his regular employment. The argument of L-P was the first to squarely present for resolution by the Idaho court the application of Idaho Code § 72-403.

C. Scope of Review and the Idaho Supreme Court's Opinion

Article V, Section 9, of the Constitution of the State of Idaho provides in part:

> On appeal from orders of the industrial accident board, [Industrial Commission] the court shall be limited to a review of questions of law. . . . [App.U, 221a].

After briefing and oral argument, the Idaho court, in an opinion authored by Justice Bistline, framed the issue:

> whether, within the meaning of I.C. § 72-403, Baker is precluded from receiving *permanent partial disability benefits* because he refused to cross a picket line, which refusal resulted in his permanent replacement. [Emphasis added] [App. D, 12a].

In addressing this issue, Justice Bistline wrote:

> As is plain from the text of the statute, Idaho Code § 72-403 is limited to partially disabled worker's who refuse to accept suitable work. Thus, the threshold question to be answered is whether Baker was a partially disabled employee at the time he refused to return to work. [App. D, 13a].

Below, the Industrial Commission had not reached a conclusion on the issue of whether Mr. Baker was permanently partially disabled at the time he refused to work; nonetheless, Justice Bistline and the Court proceeded to answer this question:

> *We conclude* he was not partially disabled at that time. Baker returned to work on March 1, 1983, after his doctor had released him to work without any limitations. At that time, Baker's doctor was of the opinion that Baker did not have any permanent disability. Further Baker had been working for approximately three months before the strike was called. As Baker was not a partially disabled employee when he lost his job, I.C. § 72-403 does not apply[1]. [Emphasis added] [App. D, 13a].

Thus, Justice Bistline effectively overruled the interpretation of Idaho Code § 72-403 previously held by the Industrial Commission and then entered, *sua sponte*, findings of fact.

The critically revealing footnote authored by Justice Bistline thereafter states:

> [1]Furthermore, in the author's opinion, Louisiana-Pacific did not offer Baker a

> "suitable job" within the meaning of the statute, being that the job offer was contingent on Baker crossing a picket line and thereafter becoming that *lowly form of life* aptly known as a "scab laborer." [Emphasis added] [App. D, 13a].

Thereafter, even though the language of the statute was unambiguous and no decision of the Court had ever construed Idaho Code § 72-403 before this case, Justice Bistline and the Court held that:

> Louisiana-Pacific's contention that Idaho Code § 72-403 barred recovery by Baker was utterly without merit for the reasons explained above. Under these circumstances an award of attorneys fees to Baker is appropriate under I.C. § 72-804. [App. D, 15a].

D. Petition for Justice Bistline to Recuse Himself from Further Proceedings and Petition for Rehearing

1. Petition to Recuse[3]

The Idaho Appellate Rules do not expressly address the procedure to bring a motion to recuse an Idaho Supreme Court justice. (*See* Idaho Appellate Rules, App. U, 222a-322a). The Constitution of the State of Idaho at Article I, Section 18, provides that:

> justice shall be administered without . . . prejudice. [App.U, 221a].

3. Baker filed a responsive affidavit and brief in opposition to L-P's Motion to Recuse even though such action is not provided for by rule. L-P sought to have this brief stricken but that motion was likewise summarily, without comment, denied in the Court's order of June 22, 1993.

In addition to this general precept of justice, Idaho Appellate Rule 48 provides that:

> Rule 48. Practice not covered by rules-in cases where no provision is made by statute or by these rules, proceedings in the Supreme Court shall be in accordance with the practice usually followed in such or similar cases, or as may be prescribed by the Court or a justice thereof. [App.U, 313a].

The Idaho Rules of Civil Procedure, adopted by the Idaho court (App.U, 322a-323a), have a procedural rule for disqualifying a judge on the basis of prejudice. Rule 40(d)(2) of the Idaho Rules of Civil Procedure provides as follows:

> Rule 40(d)(2). Disqualification for cause. – A. Grounds. Any party to an action may disqualify a judge or magistrate for cause from presiding in any action upon the following grounds: . . . 4. That the judge or magistrate is biased or prejudiced for or against any party or the case in the action.
>
> B. Motion for Disqualification. Any such disqualification for cause shall be made by a motion to disqualify accompanied by an affidavit of the party or the party's attorney stating distinctly the grounds upon which disqualification is based and the facts relied upon in support of the motion. Such motion for disqualification for cause may be made at any time. The presiding judge or magistrate sought to be disqualified shall grant or deny the motion for disqualification upon notice and

> hearing in the manner prescribed by these rules for motions. [App.U, 326a-327a].

Pursuant to Idaho Appellate Rule 48 and Rule 40(d)(2) of the Idaho Rules of Civil Procedure, L-P filed a Motion for Justice Bistline to Recuse Himself based upon (1) the Code of Judicial Conduct (App. U, 328a); (2) the Affidavit of Counsel, (App. L, 167a-169a); (3) Justice Bistline's personal partisan opinion and the appearance of bias and prejudice; (4) violation of L-P's due process rights guaranteed by the Fourteenth Amendment of the Constitution of the United States; and (5) Article 1, Section 18, of the Idaho Constitution (App.U, 221a).

Pursuant to Rule 40(d)(2)(B), a motion to disqualify, which may be filed at any time, once filed, requires that the judge sought to be disqualified *shall* grant or deny the motion for disqualification upon notice and hearing in the manner prescribed by these rules for motions. The rule's procedure is mandatory.

No notice or hearing was provided to L-P as specifically required by the rule. A summary order denying the Motion to Recuse was entered simultaneously with the order denying L-P's Petition for Rehearing. No basis for the denial of the Motion to Recuse was ever articulated by the Idaho Supreme Court.

2. Petition for Rehearing[4]

L-P's Petition for Rehearing (App. I, 152a-153a) was based upon the following:

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4. Baker filed a brief in opposition to the Petition for Rehearing even though this conduct is specifically prohibited by Idaho Appellate Rule 42 which states: "no response to any petition for rehearing shall be except upon direction of the Court." (App.U, 308a-309a). L-P filed a motion to strike the response but that was also denied in the generic order of the Court of June 22, 1993. Further, (Cont'd)

1. The Idaho court violated Article V, Section 9, of the Constitution of the State of Idaho, by entering a finding of fact;

2. The Idaho court violated L-P's right to due process under the Fourteenth Amendment to the Constitution of the United States (by taking action in violation of the Idaho Constitution's prohibition against entering findings of fact);

3. The Idaho court's opinion was unconstitutionally biased in violation of L-P's right to due process under the Fourteenth Amendment of the Constitution of the United States and in violation of L-P's right to the administration of justice without prejudice under Article I, Section 18, of the Constitution of the State of Idaho;

4. The award of attorney's fees was not supported by law.

The Court thereafter summarily entered its order of June 22, 1993, which denied the Petition for Rehearing and at the same time denied all other pending matters without comment, discussion or explanation on these substantial federal questions.

REASONS FOR GRANTING THE WRIT

The substantial questions presented in this petition are directed to the role of courts as the ultimate guarantors of fair and meaningful proceedings in our constitutional regime. They place before the scrutiny of this Court the bias and prejudice of Idaho's

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(Cont'd)

after the filing of the Petition for Rehearing and the Motion to Recuse, the clerk of the court entered an order awarding costs and attorneys fees because "no objection was filed." Thereafter, L-P filed a motion to vacate the order awarding costs and attorneys fees because this order was premature as an objection had been filed and was pending with the court. This motion was also denied by the order of the Court of June 22, 1993.

Supreme Court. The Idaho court's unconstitutional bias and prejudice was revealed when it utilized a bigoted epithet for people who cross picket lines, branding them a "lowly form of life." The Idaho court also called into question its ability, without higher supervision, to act as a guardian and guarantor of fair and meaningful proceedings when, without any explanation, it refused to provide L-P with the notice and hearing required by the court's own rules. The touchstone of due process is protection against the type of arbitrary conduct exhibited by the Idaho court. *Wolff v. McDonnell,* 418 U.S. 539, 558 (1974).

A party before the Idaho court does not receive a fair and meaningful hearing when, after it raises concerns as to the impartiality of a member the Idaho court, and the constitutional validity of its decision under the Constitution of the United States, the Idaho court's only response is a terse "DENIED.' The essence of due process is the requirement of notice and an opportunity to be heard. *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976). The very purpose of procedural due process is to convey to the party a feeling that the government has dealt with it fairly. *Carey v. Piphus*, 435 U.S. 247, 262 (1978).

Courts that refuse to confront and evaluate their own actions in a fair, open, and meaningful manner, but instead choose to hide behind their power, to the extent of violating their own rules of procedure, cannot command the respect necessary to generate "the feeling, so important to a popular government, that justice has been done." (*Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 172 (1951) (Frankfurter, J. concurring opinion). The cornerstone of "justice" is that "justice must satisfy the appearance of justice." *Offutt v. United States,* 348 U.S. 11, 14 (1954). Without the "appearance of justice" even the most technically sound reasoning is not justice. It merely erodes the fundamental foundation of our society, the principle that judges are impartial.

It is hard to imagine under any definition of "justice" that L-P received it when Idaho's court:

1. Exhibited extra judicial bias by labelling an entire class of persons a "lowly form of life"; and

2. Violated its state's constitution by entering a finding of fact; and

3. Ignored its own rules of procedure by denying a party its right to notice and hearing, and proceeding without authority to enter an order.

4. Awarded punitive attorney fees against L-P for appealing an Industrial Commission decision and advocating the statutory interpretation ultimately adopted by the court.[5]

Each separate transgression is substantial. Taken as a whole, they have a tremendously negative impact upon a party's perception of its receipt of justice.

This Court should exercise its jurisdiction and issue a Writ of Certiorari to review the actions of the Idaho court which led to these substantial questions under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

A. Bias And Prejudice

The partisan flavor of the opinion, concurred in by the remaining justices; the failure of the Idaho court to follow its established procedures in addressing post-decision motions that raised significant constitutional questions; the chastisement of L-P

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5. A court may award punitive attorneys's fees if the court finds "that the employer or his surety contested a claim for compensation made by an injured employee . . . *without reasonable ground*." I.C. 72-804 (emphasis added).

for presenting a question that in the opinion of the Idaho court was "utterly without merit" even though it was a clear case of first impression that resulted in the pronouncement of a new test; and a subsequent punitive award of attorney's fees against L-P, are clearly indicative of an inclination and preference that interfered with impartial judgment and which do not meet the "appearance of justice." *Aetna Life Insurance Company v. LaVoie*, 475 U.S. 813, 821 (1986). In *Aetna*, this Court reversed an Alabama Supreme Court decision where one of the leading justices in the opinion exhibited an interest that violated the appearance of justice. *Id.* at 837.

Parties and the public, for many valid reasons, are not, and should not be, privy to the private internal decision making process of courts on specific cases. The fundamental basis for allowing this process to proceed outside the scrutiny of the public eye is the need for unrestrained collegial discussion. This is allowed because of the rebuttable presumption, critical to our form of justice, that, "as Blackstone put it, the law will not suppose a possibility of bias or favor in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that perception and idea." *Aetna*, 475 U.S. at 820. The requirement of impartiality under the Due Process Clause "safeguards . . . the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision-making process." *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). Because of the critical role that the concept of an impartial judiciary plays in our form of government and society, that presumption of impartiality must be jealously guarded. *Id.* at 243. Once the presumption is rebutted a court's conduct must be closely scrutinized. No question of partisanship can be allowed to remain unresolved if our system is to survive.

If the decision of the Idaho court, and its post-decision actions are allowed to stand, without review, this fundamental but fragile

cornerstone of our society will be shaken and weakened. By the egotistical stroke of his pen, a justice of the Idaho court has rebutted the presumption and exposed the appearance of the unacceptable: judicial partisanship. Certainly Justice Bistline was not dealing with the parties in an impartial fashion when he penned his bigoted[6] opinion contained in footnote 1 (App. D, 13a). The remainder of the Idaho court's justices, implicitly by their concurrence, affirmatively by their refusal to provide notice and hearing, and by their denial of the Petition for Rehearing without comment in light of the significant challenge to their impartiality, certainly failed to meet the standard of the "appearance of justice." By adopting Justice Bistline's opinion, without any disavowal of the footnote, the remainder of the Court also adopted his bigoted epithet.

In its appeal to the Idaho court, presenting a straightforward and simple question involving the construction of a clearly worded statute, L-P ran unknowingly head-on into the buzzsaw of Justice Bistline's deep-seated and unconscionable bias and prejudice.

L-P recognizes that not all questions of judicial bias and prejudice rise to a constitutional level. *Aetna Life Insurance Company v. LaVoie*, 475 U.S. at 821. The petitioner in *Aetna* argued that Justice Embry's frustration with insurance companies justified recusal under the Due Process Clause. The court indicated that at some point disqualification is constitutionally required, although in *Aetna* it found bias and prejudice on interest grounds. The decision of the Idaho court, which labels an entire class of persons as a "lowly form of life," is an extreme case in which disqualification is constitutionally required.

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6. Webster's II New Riverside Dictionary defines bigot as "one fanatically devoted to one's own group, religion, race or politics and intolerant of those who differ."

Clearly Justice Bistline and his compliant court members, revealed a specific non-pecuniary interest in the advancement of organized labor interests at the expense of employers. An interest is sufficiently "direct" if the outcome of the challenged proceeding substantially advances the judge's opportunity to obtain some desired goal. (*See* Justice Brennan's concurrence in *Aetna Life Insurance Company v. LaVoie*, 475 U.S., at 829-831). The decision in this case only peripherally had to do with the issue before the court; *i.e.*, whether "partially disabled" only meant "temporarily" partially disabled; rather, the decision's purpose was the advancement of organized labor interests at the expense of employers. One can never know with certainty what Justice Bistline's agenda was when he authored the opinion because he is not involved in a lawsuit like Justice Embry was in the *Aetna* case and his deposition cannot be taken. However, his bigoted epithet, on its face, can lead only to the conclusion that his intent was to assist a union member and unions at any cost. Justice Bistline is well aware of the impact that an Idaho court's opinion generates through publicity. Through the use of his nationally published forum he will impact union attitudes nationwide. (*See* Justice Bistline's dissent in *AFL-CIO v. Leroy,* 110 Idaho 691, 718 P.2d 1129, 1137-1163 (1986) and dissent on Petition for Rehearing. *Id.* at 1163.

B. Improper Entry of Findings of Fact

The institutions of government in the State of Idaho were created by the people of Idaho for their benefit. Our society cannot ever lose site of that fact. Ironically, almost seven years ago in an impassioned dissent in Idaho's landmark right-to-work case, Justice Bistline argued that very point himself. *Idaho AFL-CIO v. Leroy,* 718 P.2d at 1143.

The Preamble to the Idaho Constitution reads:

> We, the people of the state of Idaho, grateful to

> Almighty God for our freedom, to secure its blessings and promote our common welfare do establish this Constitution. [App.U, 220a].

As provided in the Constitution of the State of Idaho, at Article I, Section 2,

> All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform or abolish the same when ever they may deem it necessary; . . . [App. U, 221a].

The people of Idaho created the judicial system and pursuant to their powers specifically limited the jurisdiction of the Idaho Supreme Court in appeals from the Industrial Accident Board. (*See* Footnote 1, on page 2 of this brief).

> On appeal from orders of the industrial accident board the court shall be limited to a review of questions of law. (Idaho Constitution, Article V, Section 9). [App. U, 221a].

In this case, the Idaho Supreme Court did not follow Idaho's constitutional limitation on its jurisdiction. By so failing the Idaho Court violated L-P's right to due process guaranteed by the Fourteenth Amendment of the Constitution of the United States. *See Hewitt v. Helms*, 459 U.S. 460, 466 (1983) (interests protected by the Fourteenth Amendment arise from the Due Process Clause and state laws); *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) (the analysis for property and liberty interests is parallel); *Toussaint v. McCarthy*, 801 F.2d 1080, 1089 (the Due Process Clause prohibits arbitrary state action); and *Toussaint v. Rushen*, 553 F. Supp. 1365 (N.D. Cal. 1983).

The Industrial Commission, in the proceeding below, held, as a matter of law, that Idaho Code § 72-403 which provides:

> 72-403. Penalty for malingering. Denial for compensation if a partially disabled employee refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or secured for him, he shall not be entitled to any compensation.

only applies to "temporary" partial disability. The Industrial Commission made no finding of fact as to whether Mr. Baker suffered "permanent" partial disability at the time he refused to return to work. The Commission specifically found that the statute only applied to "temporary" partial disability and that since Mr. Baker was not "temporarily" partially disabled at the time he refused to return to work, the statute did not apply.

On appeal to the Idaho Supreme Court, L-P argued that Idaho Code § 72-403 applied to *all* partial disability, be it temporary or permanent.

> The conclusion of the Industrial Commission is that "partially disabled" refers only to temporary partial disability. This definition is not supportable. [L-P's Brief, App. F, 50a].

L-P, in its Reply Brief, later argued:

> The statute does not differentiate between temporary and permanent partial disability. [L-P's Reply Brief, App. H, 139a].

The Idaho Supreme Court, apparently feeling somewhat constrained by the unequivocal language of I.C. § 72-403, held that

> As is plain from the text of the statute, Idaho Code § 72-403 is limited to partially disabled workers who refuse to accept suitable work. [App. D, 13a].

At this juncture, the Idaho Court, announced a "threshold test" in the interpretation of the application of Idaho Code § 72-403:

> Thus, the threshold question to be answered is whether Baker was a partially disabled employee at the time he refused to return to work. [App. D, 13a)]

At that point, the Idaho Court should have remanded the case to the Industrial Commission, as it had done many years earlier in *Gomez, supra,* because the Industrial Commission had never reached nor resolved that question. Idaho case law is clear that disability determinations are factual matters solely for the Industrial Commission to decide.

> The determination of the extent of a claimant's disability is a factual matter for the Industrial Commission. *Frank v. Bunker Hill Company, Co.,* 117 Idaho 790, 792 P.2d 815, 819 (1990); *Griffen v. Potlatch Forest,* 93 Idaho 174, 457 P.2d 413 (1969).

As the Idaho court also held in *Frank,* the Idaho Supreme Court, in reviewing Industrial Commission decisions, "cannot engage in a *de novo* review of the facts." *Frank,* 792 P.2d at 818. The record is unequivocal that the Industrial Commission made no finding of fact as to whether Mr. Baker suffered any partial disability other than "temporary" partial disability when he refused to return to work. The Idaho court, however, *sua sponte*

without any constitutional authority to support its action, proceeded to enter its own finding of fact.

> We conclude he was not partially disabled at that time. [App. D, 13a].

The Idaho court, in support of its finding of fact, then proceeded to discuss the portions of the record that it felt were relevant to support *its* finding of fact. Most notably, no discussion is attempted by the Idaho court as to what the Industrial Commission's finding on that question of fact had been or whether it was supported by substantial evidence. The reason these are absent is because there was no consideration of this question of fact by the Industrial Commission. At the time that the Industrial Commission ruled on the case it was clearly of the erroneous opinion that Idaho Code § 72-403 only applied to "temporary" partial disability. It could not foresee that the Supreme Court would announce a new "threshold question."

Making a finding of fact exceeds the constitutional authority of the Idaho court in appeals from the Industrial Commission. This action violates L-P's right to due process as guaranteed by the Fourteenth Amendment of the Constitution of the United States. By ignoring this clear and unambiguous constitutional provision, the Idaho Supreme Court placed itself above the ultimate authority in the state - the people of the State of Idaho. Such an arrogant trampling of the concept of constitutional authority will give the citizenry grave concern about the willingness of the judiciary, not just Idaho's, to deal fairly with all parties.

C. Failure to Provide Notice and Hearing on the Motion to Recuse Before Ruling on the Petition for Rehearing

The failure of the Idaho Supreme Court to adhere to its own rules of procedure in addressing motions for recusal of a

participating justice presents a fundamental and substantial procedural due process question to this Court.

After receipt and review of the Idaho Court's decision of March 11, 1993, L-P filed its Petition for Rehearing and simultaneously therewith filed its motion for Justice Bistline to recuse himself from further proceedings in the matter. (App.K, 164a-166a). The procedure to seek disqualification of an Idaho Supreme Court justice is set forth by a reference in Rule 48 of the Idaho Appellate Rules, and Idaho Rules of Civil Procedure, Rule 40(d)(2). Idaho Rules of Civil Procedure, Rule 40(d)(2) provides in part:

> the presiding judge ... sought to be disqualified shall grant or deny the motion for disqualification upon notice and hearing in the manner prescribed by these rules for motions. [App.U, 326a-327a].

After the filing of such a motion, the Idaho Rules of Civil Procedure, Rule 40(d)(5) provide in part:

> upon the filing of a motion for disqualification, the presiding judge shall be without authority to act further in such action except to grant or deny such a motion for disqualification. [App.U, 327a].

The Idaho court did not hold that L-P followed an improper procedure in seeking Justice Bistline's recusal. Rather, it disregarded the rules applicable to the motion to disqualify and before resolving the disqualification issue proceeded to determine the Petition for Rehearing. Only after that had been denied did it then address the motion for disqualification by matter-of-factly denying all other pending motions.

Idaho Appellate Rule 42 provides no insight into how the Idaho Supreme Court determines whether or not to grant or deny a petition for rehearing. Idaho Appellate Rule 118 as pertains to petitions for review to the Idaho Supreme Court from the Idaho Court of Appeals, provides insight (App. U, 320a-321a). Apparently, it involves a vote among the Idaho justices and requires a majority for the petition to be granted. Even Justice Bistline, in *Idaho State AFL-CIO v. Leroy*, 718 P.2d at 1163, intimated such wherein he stated:

> My vote to grant a rehearing was insufficient. . .

In any event, while we are not told how the decision on L-P's petition for rehearing was resolved, the order denying the petition for rehearing (App. A, 1a-2a) reflects it is "By Order of the Supreme Court." Since no order was entered disqualifying Justice Bistline or indicating he did not participate, it can only be presumed that he participated in the vote to deny the Petition for Rehearing in disregard of the motion seeking his disqualification.

There are no Idaho cases interpreting the effect of Idaho Rules of Civil Procedure Rule 40(d)(5) when a judge, after a party has filed a motion for disqualification, proceeds to act further in such action on matters other than the motion seeking disqualification. However, in view of the clear wording of the rule, it is clear that the intent is to continue the prior statutory process wherein,

> All of the proceedings, findings, conclusions and orders in this action, after the affidavit of prejudice was filed, were improper, void and of no effect. *Lewiston Lime Company v. Barney*, 87 Idaho 462, 394 P.2d 323, 326 (1964).

Even the Alabama Supreme Court in its handling of the

petition for rehearing, coupled with the motion seeking disqualification of one of its participating justices in *Aetna Life Insurance Co., v. LaVoie*, 475 U.S. at 818, recognized that a ruling on the issue of disqualification must precede any ruling on the petition for rehearing.

Justices Brennan and Blackmun, in their concurring opinions to this Court's decision in *Aetna Life Insurance Co., v. LaVoie*, 475 U.S. at 829-833, shed some light on the internal interaction between justices on a multi-justice panel, and how that interplay may affect a decision making process. Justice Blackmun notes the "powers of persuasion," of each justice beyond his or her mere votes. *Id.* at 833. Justice Brennen indicates that the influence of a single participant can never be measured with precision. The presence of a biased judge denies the litigants of the "appearance of justice." Id. at 831. To presume that Justice Bistline, who revealed his intolerance of anti-union actions, had no input into the denial of the petition for rehearing would be erroneous.

The Idaho Court's failure to provide notice and hearing on the motion seeking disqualification and in failing to stay the decision making process on the Petition for Rehearing violated L-P's "absolute" right to procedural due process under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Our society cannot continue to exist if government, especially the highest court of a state, does not require that procedural due process be observed, regardless of the substantive assertions. *Carey v. Piphus*, 435 U.S. 247, 266 (1978). After all, the reason for notice and hearing is to determine the merits of the substantive assertions. This "absolute" right takes on paramount importance when the failure to provide procedural due process evolves from a question as to the lack of impartiality of a justice participating in a decision. What occurred when the Idaho court squarely faced with the question of the bias and prejudice of one of its own participating justices, failed to provide the required notice

and hearing and proceeded to determine the merits of the Petition for Rehearing with the tainted justice participating, is truly unconscionable. The purpose of procedural due process is to ensure that a person is dealt with fairly and to convey to the individual that the government has dealt with him fairly. *Carey, supra.* It can not be said that L-P was dealt with fairly by the Idaho court.

This Court, as guardian for our procedural due process rights guaranteed by the Fourteenth Amendment to the United States Constitution of the United States, should not permit this extreme transgression by the Idaho court to go unreviewed.

CONCLUSION

This case presents compelling reasons for this Court to issue its Writ of Certiorari. This case is not merely one of the Idaho Supreme Court interpreting statutes and the United States Constitution in a questionable manner. While those issues certainly exist, this case presents for the review of this Court the affirmative actions of the Idaho Supreme Court, in its review of a lower administrative agency decision, that violate L-P's constitutional rights protected by the Fourteenth Amendment of the Constitution of the United States. The only authority that can review the Idaho court's actions, which on their face violate the "appearance of justice," is this Court. The repercussions that emanate from the affirmative acts of the Idaho court will have national impact not only upon union-management relations but also upon the citizenry's perception that judges are impartial guarantors of fair and meaningful proceedings in our constitutional regime. This Court should grant this petition and review the Idaho court's actions.

Respectfully submitted,

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APPENDIX A — ORDER DENYING PETITION FOR REHEARING DATED JUNE 22, 1993

IN THE SUPREME COURT OF THE STATE OF IDAHO

NO. 19430

Ref. No. 93S-85

BURTON BAKER,

Claimant-Respondent,

v.

LOUISIANA PACIFIC CORPORATION, Employer,

Defendant-Appellant.

ORDER DENYING PETITION FOR REHEARING

THE APPELLANT HAVING FILED A PETITION FOR REHEARING and supporting BRIEF on March 31, 1993, of the Court's opinion of March 11, 1993; therefore, after due consideration,

IT HEREBY IS ORDERED that Appellant's PETITION FOR REHEARING be, and hereby is, DENIED.

IT FURTHER IS ORDER that all other pending matters be, and they hereby are, DENIED with the Remittitur to issue forthwith.

DATED this 22nd day of June, 1993.

Appendix A

By Order of the Supreme Court

s/ Chas F. McDevitt
Chas F. McDevitt, Chief Justice

ATTEST:

s/ Frederick C. Lyon
Frederick C. Lyon, Clerk

cc: Counsel of Record
Secretary-Industrial Commission

APPENDIX B — REMITTITUR DATED JUNE 22, 1993

IN THE SUPREME COURT OF THE STATE OF IDAHO

NO. 19430

BURTON BAKER,

Claimant-Respondent,

v.

LOUISIANA PACIFIC CORPORATION, Employer,

Defendant-Appellant.

REMITTITUR

TO: INDUSTRIAL COMMISSION, STATE OF IDAHO.

The Court having announced its Opinion in this cause March 11, 1993, which has now become final; therefore,

IT IS HEREBY ORDERED that the Industrial Commission shall forthwith comply with the directive of the Opinion, if any action is required.

DATED this 22nd day of June, 1993.

s/ Frederick C. Lyon
Clerk of the Supreme Court
STATE OF IDAHO

APPENDIX C — ORDER AWARDING COSTS AND ATTORNEY FEES DATED APRIL 23, 1993

IN THE SUPREME COURT OF THE STATE OF IDAHO

NO. 19430

Ref. 93S-85

BURTON BAKER,

Claimant-Respondent,

v.

LOUISIANA PACIFIC CORPORATION, Employer,

Defendant-Appellant.

ORDER AWARDING COSTS AND ATTORNEY FEES

A MEMORANDUM OF COSTS AND ATTORNEY'S FEES with attachment and supporting AFFIDAVIT of counsel was filed by Respondent March 25, 1993. No objection was filed; therefore, good cause appearing,

IT IS HEREBY ORDERED that costs and attorney fees are AWARDED to Respondent and against Appellant as follows:

Costs of Respondent's brief	$ 132.00
Attorney Fees	$3,492.00
Total	$3,624.00

DATED this 23rd day of April, 1993.

Appendix C

By Order of the Supreme Court

s/ Frederick C. Lyon
Frederick C. Lyon, Clerk

cc: Counsel of Record
Secretary-Industrial Commission

APPENDIX D — IDAHO SUPREME COURT OPINION, *BAKER V. LOUISIANA-PACIFIC*, S. CT. NO. 19430 FILED MARCH 11, 1993

1993 Opinion No. 25

IN THE SUPREME COURT OF THE STATE OF IDAHO

S. Ct. No. 19430

North Idaho Term, October 1992

Filed: March 11,1993

Frederick C Lyon, Clerk

BURTON BAKER,

Claimant-Respondent,

v.

LOUISIANA PACIFIC CORPORATION, Employer,

Defendant-Appellant.

Appeal from the Industrial Commission. *Affirmed.*

Sims, Liesche, Newell, Kelso, Wallace & Wallace, Coeur d'Alene, Idaho, for appellant. Starr Kelso argued.

Steven C. Verby, Sandpoint, Idaho, for respondent.

BISTLINE, J.

Appendix D

This is an appeal from a decision of the Industrial Commission. The employer, Louisiana Pacific Corporation, challenges the award of permanent partial disability benefits to the employee, Burton Baker. We affirm the order of the Industrial Commission.

BACKGROUND

Claimant-respondent Burton Baker was a sawmill worker for most of his adult life. On October 21, 1982, while working at the Moyie Springs sawmill for defendant-appellant Louisiana Pacific Corporation, Baker suffered an injury. He was attempting to adjust some firehoses and fell approximately eight to ten feet onto a cement floor seriously injuring his wrists.

Baker was hospitalized for three days and both wrists were in casts for three months. Baker voluntarily returned to work without pay in order to exercise his arm slightly more than three months following his industrial accident. He was released for and returned to full-time work at his former job as edgerman on March 1, 1983, within six months of the accident. Baker had difficulty operating the edge-clipper the first month but later was able to do his work without difficulty.

Baker worked about three months until June 27, 1983, when his union went on strike; as a former local and regional union member, Baker did not cross the picket line. He received a letter from Louisiana Pacific informing him he had until August 22, 1983, to return to work or his job would be filled. However, Baker did not return to work and continued to strike. He was terminated and received strike pay for about a year. On or about April 29, 1984, he began working part-time for the United States Forest Service.

Appendix D

Sometime around March 26, 1987, Baker was examined by Dr. Brinkman, a Spokane, Washington, hand surgeon. After examination and evaluation of nerve conduction studies, Dr. Brinkman concluded Baker suffers from a chronic low-grade median nerve compression syndrome. At that time, he did not believe Baker had a "significant disability." No rating was given.

On December 1, 1987, Baker experienced involuntary opening of his left hand. Dr. Hill testified that x-rays revealed "possible mild degenerative joint change and/or incongruity" secondary to the fracture. Dr. Hill stated on January 12, 1988, that degenerative changes can slowly progress although he saw no debilitating impairment at that time.

Dr. Blaisdell, a board-certified orthopedic surgeon from Sandpoint, examined Baker on August 24, 1989. Baker reported aching in his left wrist about 25% of the time, especially when it is cold and damp and that the joint would stiffen in bad weather. Baker also reported that he cannot drive for long periods of time and that his left wrist would swell with increased activity. He also complained of loss of strength and the inability to engage in his previous avocations of playing a musical instrument and golfing. Dr. Blaisdell diagnosed:

> Healed, slightly angulated fracture involving the distal right radial shaft with minimal angulation and shortening at the fracture site. Probable fracture involving the articular surface of the [left] distal radius with minimal shortening and possible early arthritic changes secondary to injury to the articular cartilage of the distal radius.

Appendix D

Baker's Ex. 1.

Dr. Blaisdell also conducted a physical capacities examination in which he concluded that Baker's ability to lift, carry, push, and pull were severely impaired. In sum, Baker can never lift or carry anything more than 20 pounds with his left hand or more than 50 pounds with his left and right hands. He can occasionally lift and carry over 10 pounds with both hands and frequently lift and carry with both hands up to 10 pounds. He can only push and pull occasionally with the right and left hands. Dr. Blaisdell assigned a 14% impairment rating of the whole person broken down as follows: left arm (4%), right arm (3%), pain (3%), diminished pronation of right forearm (1%), and lifestyle (3%). Dr. Blaisdell explained by way of post-hearing deposition that x-rays he took showed early stages of post-traumatic arthritis. He also testified that the arthritis will only worsen with time.

On May 25, 1990, Dr. Hill examined Baker. The doctor found symptomatology compatible with post-traumatic osteoarthritis of the left wrist with chronic pain and activity limiting discomfort and loss of strength. Moreover, he was of the opinion that this condition "would not be expected to improve with time, indeed will more likely increase in severity with time." Baker's Ex. 3. On June 25, 1990, Dr. Hill agreed with a 14% impairment rating rendered by Dr. J. S. Blaisdell.

Dr. Sears of the Spokane Orthopaedic & Fracture Clinic, examined and evaluated Baker on September 13,1990, at the request of Louisiana Pacific. Dr. Sears gave Baker an impairment rating of 4% of the left upper extremity and 3% of the right upper extremity. According to Dr. Blaisdell, this translates to 4% of the whole person. (However, Dr. Blaisdell also explained that the orthopedic section of the AMA Guides does not allow for pain.)

Appendix D

On October 8, 1990, Dr. Goldberg examined Baker and conducted essentially the same range of motion examinations as did the other doctors. Although he did not consider the AMA Guides as "gospel," Dr. Goldberg rated Baker between 8% to 12% of the whole person based on the guides. Dr. Goldberg was of the opinion that Baker could no longer perform the work required at his former job.

Based on this evidence, the Commission concluded that Baker suffers from a 9% impairment of the whole person. After assessing the medical and non-medical factors pursuant to I.C. §§ 72-423, 72-425 and 72-430, the Commission concluded that Baker had suffered a permanent partial disability of 35% of the whole person, which includes the permanent partial impairment rating of 9%. Accordingly, the Commission ordered Louisiana Pacific to pay compensation to Baker.

Louisiana Pacific appealed.

ISSUES ON APPEAL

1. Was there substantial and competent evidence to support the Commission's finding of nine percent impairment?

2. Does an injured employee who is replaced because he refuses to cross a union picket line lose the statutory entitlement to partial disability benefits?

3. Was there substantial and competent evidence to support the Commission's finding of partial disability?

4. Is Baker entitled to attorney fees on appeal?

Appendix D

DISCUSSION

1. The Commission's finding of permanent partial impairment is supported by substantial and competent evidence.

The first issue in this case is whether the Commission's finding of partial impairment is supported by substantial and competent evidence. The relevant statute in this regard is I.C. § 72-424, which provides:

> Permanent Impairment Evaluation — "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and nonspecialized activities of bodily members.

The factor of pain should be considered and included in the impairment evaluation as it relates to a functional loss. *Urry v. Walker & Fox Masonry Contractors,* 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989). A physician's opinion as to the extent of impairment is advisory only and is not binding upon the Commission. Here, the Commission concluded, that Baker suffers from a 9% impairment of the whole person.

Louisiana Pacific argues that the Commission's findings of fact in this regard are not supported by substantial and competent evidence. In particular, appellant argues that:

a) Dr. Hill's 1990 evaluation of Baker is without validity because Dr. Hill did not personally examine Baker, he had not been

provided Dr. Brinkman's report and was pressured by Baker's counsel to give a evaluation favorable to Baker.

b) Dr. Brinkman did not find any significant disability.

In essence, Louisiana Pacific asks this Court to find Dr. Brinkman to be more credible than Drs. Hill and Blaisdell. We decline that invitation. The Court has recently held it will defer to the Commission's finding as to the credibility of medical experts. *Ross v. Tupperware,* __ Idaho __, __, 837 P.2d 316, 318 (1992). There is no reason to depart from that rule in this case.

2. Idaho Code § 72-403 does not preclude Baker from receiving permanent partial disability benefits.

The next issue is whether, within the meaning of I.C. § 72-403, Baker is precluded from receiving permanent partial disability benefits because he refused to cross a picket line, which refusal resulted in his permanent replacement. I.C. § 72-403 provides:

> 72-403. Penalty for malingering — Denial of compensation. — If a partially disabled employee refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or secured for him, he shall not be entitled to any compensation.

(Emphasis added.)

Louisiana Pacific asserts that Baker should be barred from receiving any compensation due to his refusal to work after suitable work was secured for him, in other words, Louisiana Pacific contends that Baker, by his refusal to cross the picket line and by his refusal to respond to Louisiana Pacific's letter calling him to return to work, is now barred from any compensation award.

Appendix D

As is plain from the text of the statute, Idaho Code § 72-403 is limited to partially disabled workers who refuse to accept suitable work. Thus, the threshold question to be answered is whether Baker was a partially disabled employee at the time he refused to return to work. We conclude he was not partially disabled at that time. Baker returned to work on March 1, 1983, after his doctor had released him to work without any limitations. At that time, Baker's doctor was of the opinion that Baker did not have any permanent disability. Further, Baker had been working for approximately three months before the strike was called. As Baker was not a partially disabled employee when he lost his job, I.C. § 72-403 does not apply.[1]

3. The Commission's folding that Baker suffered disability in excess of impairment is supported by the evidence.

The final issue raised is whether the Commission erred in finding a 35% permanent partial disability. The rating of a permanent partial disability is "an appraisal of the injured worker's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors provided in section 72-430, Idaho Code." I.C. § 72-425.

The determination of the existence and extent of permanent partial disability is one of fact. Accordingly, our review is limited to the question of whether the Commission's finding is supported

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1. Furthermore, in the author's opinion, Louisiana Pacific did not offer Baker a "suitable job" within the meaning of the statute, being that the job offer was contingent on Baker crossing a picket line and thereafter becoming that lowly form of life aptly known as a "scab" laborer.

by substantial and competent evidence. *Roberts v. Asgrow Seed Co.*, 116 Idaho 209, 211, 775 P.2d 101, 103 (1989).

Louisiana Pacific argues that the evidence does not support the award because: (1) Baker was able to perform his old job after the injury; (2) his current job is just as physically difficult, if not more difficult than his job at the sawmill; and, (3) the testimony of the vocational expert was not entitled to any weight because he based his testimony on invalid assumptions. We disagree.

First, even though Baker did return to his old job, that was in 1983 and it does not logically follow that his condition is the same now as it was ten years ago. Dr. Blaisdell, who examined Baker in 1989, concluded Baker could not perform the lifting required at the sawmill and, additionally, Baker's post-traumatic arthritis would continue to worsen. Dr. Goldberg specifically testified that Baker could not go back to his old job.

Second, we acknowledge that although the job description of Baker's current job makes it seem that he is currently performing heavy labor, there was testimony that the job had been substantially modified so that Baker could continue in his employment. In light of our deferential standard of review, we cannot conclude the Commission erred in accepting that testimony as true.

Finally, Louisiana Pacific's argument that the vocational expert's testimony was not valid is nothing more than a request to have the Court reweigh the evidence. Louisiana Pacific attacked the validity of the vocational expert's testimony at the hearing, yet the Commission chose to accept his testimony as true. The evaluation of evidence is left to the sound discretion of the Commission and this Court will not second-guess the

Commission's determination. *Ross v. Tupperware*, __ Idaho at __, 837 P.2d at 318.

We have reviewed the record and find that there is evidence to support the Commission's finding of a 35% permanent partial disability.

4. Baker is entitled to attorney fees on appeal.

Baker has asked the Court to award him attorney fees on appeal. Idaho Code § 72-804 permits any court presiding in a worker's compensation case to award attorney fees to a claimant if the court determines that an employer or surety has contested a claim for compensation "without reasonable ground." Baker asserts attorney fees should be awarded because Louisiana Pacific's appeal was frivolous. We agree.

The employer's arguments as to the existence of the impairment and the extent of Baker's disability were nothing but efforts to have this Court reweigh evidence on appeal. Further, Louisiana Pacific's contention that I.C. § 72-403 barred recovery by Baker of was utterly without merit for the reasons explained above. Under these circumstances, an award of attorney fees to Baker is appropriate under I.C. § 72-804.

CONCLUSION

We affirm the order of the Industrial Commission. Baker's request for attorney fees on appeal is granted. Costs on appeal to Baker.

McDEVITT, C.J., JOHNSON and TROUT, JJ., concur. BAKES, J. Pro Tem. concurs (following his retirement on February 1, 1993).

APPENDIX E — INDUSTRIAL COMMISSION, STATE OF IDAHO *BAKER V. LOUISIANA-PACIFIC,* FINDINGS OF FACT, CONCLUSIONS OF LAW, PROPOSED ORDER, AND ORDER FILED JUNE 11, 1991

BEFORE THE INDUSTRIAL COMMISSION

STATE OF IDAHO

IC 82-412387

BURTON BAKER,

Claimant,

vs.

LOUISIANA-PACIFIC CORPORATION,

Self-Insured Employer,

Defendant.

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND PROPOSED ORDER

The subject matter of this case involves the extent of Claimant's impairment and disability. Defendant Employer Louisiana-Pacific further alleges Claimant should be denied disability benefits because he voluntarily removed himself from the labor market by refusing to cross a picket line while employed by Defendant.

Referee Peggy McMahon heard the case in Coeur d'Alene, Idaho, on October 11, 1990. Claimant was represented by Steven C. Verby, of Sandpoint, and Defendant Self-Insured Employer was

represented by Starr Kelso, of Coeur d'Alene. Post-hearing testimony was presented under the Rules. Having considered the record established in the case and the arguments of counsel submitted in their briefs, Referee Peggy McMahon submits the following Findings of Fact, Conclusions of Law, and Proposed Order which she recommends the Commission adopt as its decision and Order.

ISSUES

The following matters are at issue:

1. The extent of Claimant's impairment; and,

2. The extent of Claimant's disability, including a determination whether Claimant is precluded from receiving disability benefits pursuant to I.C. § 72-403.

EVIDENCE CONSIDERED

The evidence considered is as follows:

1. The oral testimony of Nan Berger, Claimant Burton Baker, and Doug Flory presented at hearing;

2. Claimant's Exhibits 1 - 4, 6 - 8, and Defendant's Exhibits A, C and D, F, H, J N, and R - V presented at hearing; Exhibits E and O admitted in part at hearing;

3. The videotaped and transcribed post-

hearing depositions of Dr. J. S. Blaisdell, Dr. James R. Hill and Steven R. Hammon and all exhibits attached thereto, including x-rays denominated as Exhibits 6, 7, 8, 9 11, 12, 13 and 14 admitted during the deposition of Dr. Blaisdell; and,

4. The transcribed post-hearing deposition of Dr. Dennis Goldberg and all exhibits attached thereto.

FINDINGS OF FACT

I

Claimant Burton Baker has been a sawmill worker most of his adult life. On October 21, 1982, while working at the Moyie Springs sawmill for Defendant Louisiana Pacific Corporation, a self-insured employer, Claimant suffered an on-the-job injury. He was attempting to adjust some firehoses and fell approximately eight to ten feet onto a cement floor. He landed first on both wrists and then on his chin and knees. The fall resulted in slightly angulated fractures of both wrists and in slight shortening of the affected bones. X-rays of the right forearm revealed a comminuted fracture of the distal radial shaft extending into the articular surface of the fragment. X-rays of the left wrist revealed a non-displaced fracture into the distal radial metaphysis, with a vertical oriented lucency in the lateral aspect. The growth plate revealed a step off of 3 mm in the medial portion of the radial metaphysis.

II

Claimant was hospitalized at Bonners Ferry Community Hospital for three days where he came under the care of Dr. James

Hill. Dr. Hill reduced the fractures and casted both arms for three months. Claimant voluntarily returned to work without pay in order to exercise his arm slightly more than three months following his industrial accident. He was released for and returned to full-time work at his former job as edgerman on March 1, 1983, within six months of the accident. Claimant had difficulty operating the edge-clipper the first month but was able to do his work without difficulty after that.

III

Claimant worked about three months until June 27, 1983 when his union went on strike. Claimant, a former local and regional union member, did not cross the picket line. He received a letter from Defendant informing him he had until August 22, 1983 to return to work or his job would be filled. However, Claimant chose not to return to work and continued to strike. He was terminated and received strike pay for about a year. On or about April 29, 1984 he began working part-time for the United States Forest Service.

IV

Impairment

It is undisputed at this point in time that Claimant has an impairment from his industrial accident. The issue before the Commission is the extent of Claimant's impairment. Five physicians have rendered opinions.

V

Dr. Hill of Bonners Ferry, Idaho, is Claimant's treating physician and a board-certified family practitioner. Dr. Hill

originally released Claimant to his full-time work as edgerman without any limitations six months after the industrial accident. About three months later on August 25, 1983, Dr. Hill was of the opinion that Claimant's arms were fine and he could do anything he wished. Dr. Hill did not believe Claimant would have any permanent disability. About three years later on March 7, 1986, Claimant saw Dr. Hill for a civil service examination for the United States Forest Service position of forestry technician. Dr. Hill indicated no restrictions on the work due to Claimant's arm injuries. A brief description of the forestry technician position follows:

> All kinds of fire suppression duties & related duties such as digging, chopping, hiking, breathing smoke & dust, working long and arduous hours.

Depo. Dr. Hill, Ex. A. A year-and-a-half later on December 1, 1987 Claimant experienced involuntary opening of his left hand. X-rays revealed "possible mild degenerative joint change and/or incongruity" secondary to the fracture. Dr. Hill stated on January 12, 1988 that degenerative changes can slowly progress although he saw no debilitating impairment at that time. Approximately two-and-a-half years later on May 25, 1990 Dr. Hill examined Claimant again. He then found symptomatology compatible with post-traumatic osteoarthritis of the left wrist with chronic pain and activity limiting discomfort and loss of strength. Moreover, he was of the opinion that this condition "would not be expected to improve with time, indeed will more likely increase in severity with time." Claimant's Ex. 3. On June 25, 1990, Dr. Hill agreed with a 14% impairment rating rendered by Dr. J. S. Blaisdell.

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VI

Dr. Blaisdell, board-certified orthopedic surgeon of Sandpoint, Idaho, had examined Claimant on August 24, 1989 at Claimant's request.[1] Claimant reported aching in the left wrist about 25% of the time, especially when it is cold and damp. The joint stiffens in bad weather. Claimant cannot drive for long periods of time; his left wrist swells with increased activity. He also complained of loss of strength. Claimant can no longer play the accordion as he used to. Nor can he play golf anymore. Dr. Blaisdell diagnosed:

> Healed, slightly angulated fracture involving the distal right radial shaft with minimal angulation and shortening at the fracture site.
>
> Probable fracture involving the articular surface of the [left] distal radius with minimal shortening and possible early arthritic changes secondary to injury to the articular cartilage of the distal radius.

Claimant's Ex. 1. Dr. Blaisdell also conducted a physical capacities examination in which he concluded, in part, that Claimant can never lift or carry anything more than 20 pounds with his left hand or more than 50 pounds with his left and right hands. He can occasionally lift and carry over 10 pounds with both hands and frequently lift and carry with both hands up to 10 pounds. He can do so frequently only up to five pounds. He can only push and pull occasionally with the right and left hands. Dr. Blaisdell

---

1. Dr. Blaisdell has discontinued treating patients and now only conducts examinations for reports.

assigned a 14% impairment rating of the whole person broken down as follows: left arm (4%), right arm (3%), pain (3%), diminished pronation of right forearm (1%), and lifestyle (3%). Dr. Blaisdell explained by way of post-hearing deposition that x-rays he took showed early stages of post-traumatic arthritis. He explained the arthritis will only worsen with time because once the articular cartilage has been damaged it has no powers of repair.

VII

Dr. Stephen R. Sears of the Spokane Orthopaedic & Fracture Clinic, examined and evaluated Claimant on September 13, 1990 at the request of Defendant. Dr. Sears gave Claimant a rating of 4% of the left upper extremity and 3% of the right upper extremity. According to Dr. Blaisdell, this translates to 4% of the whole person. (However, Dr. Blaisdell also explained that the orthopedic section of the AMA Guides does not allow for pain.)

VIII

Dr. Dennis Goldberg, a recent resident of Hayden, Idaho, has practiced almost entirely in California since 1963. His practice has been confined to family, occupational, and industrial medicine. On October 8, 1990 Dr. Goldberg examined Claimant at his request and conducted essentially the same range of motion examinations as did the other doctors. He found Claimant limited as did the other physicians. Although he did not consider the AMA Guides "gospel," he rated Claimant between 8% to 12% of the whole person based on the Guides. When asked by defense counsel to evaluate the job-site analysis performed by Owen Consultant Services, of re-man edgerman, Claimant's former position (Goldberg Depo. Ex. 5), Dr. Goldberg was of the opinion that Claimant could no longer perform that work.

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IX

On or about March 26, 1987 Claimant was referred to Dr. James F. Brinkman, a Spokane, Washington, hand surgeon. After examination and evaluation of nerve conduction studies, Dr. Brinkman concluded Claimant suffers from a chronic low-grade median nerve compression syndrome. At that time he did not believe Claimant had a "significant disability." No rating was given.

X

It is undisputed Claimant suffers a minimum of 4% of the whole person based on the right and left arm injuries. The Referee also adds 5% for pain and "lifestyle" losses. Claimant has worked actively to reduce pain and to increase flexibility. Moreover, from all reports, he is not a complainer. Claimant has worked actively to be able to return to his old job even before he was released to full-time work. He lifts weights, performs outdoor activities, and soaks his arms when in pain instead of taking medication. Nevertheless his activities of daily living have been diminished. In reviewing the evidence as a whole, the Referee therefore finds that Claimant suffers from a 9% impairment of the whole person.

XI

Disability

The next issue before the Commission is the extent of Claimant's disability, including a determination of whether Claimant is precluded from receiving disability benefits pursuant to I.C. § 72-403. The Referee finds that Claimant refused to return to work on or before August 22, 1983 — the date on which

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Defendant Employer stated Claimant must return to work or he would be fired. However, the Referee concludes this does not automatically preclude Claimant from receiving disability benefits. See Conclusions of Law II, *infra*.

XII

Consequently, left for consideration is the issue of the extent of Claimant's disability, if any, beyond that of impairment. In 1984 Claimant began working for the United States Forest Service in the Silviculture Department in the Bonners Ferry Ranger District in the stand crew. Despite the fact that it appears he is a firefighter from his civil service heal examination, Claimant's job duties involved hiking in the woods, doing habitat typing, taking growth measurements with an increment borer, and reporting the results. He has worked on a full-time temporary basis annually ever since. His present duties include collecting pine cones and preparing trees for planting. All crew members are expected to plant trees and fight fires, but Claimant's job has been modified so that he does not have to perform those duties. Whenever there is a fire, he acts as a "single resource" ordering and distributing supplies. Nan Berger, his immediate supervisor, testified Claimant's movements at work have stiffened over the years. He has not used the pulaski, a fire fighting tool, since 1986. He does not use a chain saw. The Referee finds that Claimant cannot engage in activity which involves strenuous work and repetitive pushing and pulling.

XIII

Doug Flory, mill manager at the Moyie Springs plant, corroborated the job-site evaluation admitted into evidence as an exhibit to Dr. Goldberg's disposition by testifying that Claimant's previous job involved continuous pushing and grasping with the

left hand. It also involved unjamming lumber and lifting boards up to 100 pounds. In reviewing the evidence as a whole, the Referee further finds that Claimant cannot return to his former position as edgerman. Nor can he return to any sawmill work which involves continuous pushing and pulling — virtually every job in a sawmill.

XIV

When Claimant searched for work after the strike, he applied for work at JD Lumber Company in Priest River. He also went to an employment agency in Coeur d'Alene two different times in an attempt to get work, including sawmill work although at that time he knew he would have to do easier work.

XV

Steven R. Hamman, vocational specialist, testified on behalf of Claimant. Mr. Hamman evaluated Claimant on April 17, 1990 and on October 11, 1990. The evaluation time period was from January 12, 1988 to November 5, 1990, the date of hearing. Based on the functional capacities evaluation of Dr. Blaisdell confirmed by Dr. Hill, Mr. Hamman was of the opinion that Claimant sustained a loss of about three-quarters of the total labor market and about one-half of the labor market he previously accessed or probably could have accessed. He explained that one-third of the labor market involves very heavy and heavy work (lift and carry up to 100 pounds). About one-third of the market falls in the medium (up to 50 pounds lift/carry) physical demand category. The remaining one third is composed of light (maximum lift/carry 20 pounds) and sedentary (maximum lift/carry 10 pounds) physical demand levels. Before his injury Claimant had access to medium, light and sedentary jobs in the labor market. After his injury, Claimant had no transferable job skills and access only to light and

sedentary jobs. Half of the job loss therefore was due to his inability to perform medium levels of work activity. The Referee accepts this testimony.

XVI

Claimant was 51 years old at the time of hearing in 1990. He has a high school education but no transferable skills or other training. Any work he obtains would probably be in the minimum wage range. He was earning $10.49 an hour at the sawmill. Claimant said his annual salary would have been about $19,000 in 1982, the year of his injury. He presently earns $7.81 an hour for the Forest Service, which represents a 26% wage reduction on an hourly basis. Claimant earned $13,811.00 in 1989 from the Forest Service or a 27% wage reduction on an annualized basis. His work with the Forest Service is only temporary and he is not guaranteed a job every year. He does not work a full 12 months.

XVII

Were Claimant forced to find another job at this time, it is likely to be more in the minimum wage range of $4.25 an hour or about a 60% wage loss. It appears, however, from Claimant's exemplary work record with the Forest Service he will continue in that capacity. It also appears that Claimant's physical condition is not deteriorating that rapidly inasmuch as it has taken eight years for him to reach his present state of arthritic development. Therefore, taking into consideration all medical and non-medical factors, the Referee finds that Claimant suffers from a disability of thirty-five percent (35%) of the whole person, which includes Claimant's permanent partial impairment of nine percent (9%) of the whole person.

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CONCLUSIONS OF LAW

I

The first issue before the Commission is the extent of Claimant's impairment. I.C. § 72-424 provides:

> Permanent Impairment Evaluation — "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and nonspecialized activities of bodily members.

The factor of pain should be considered and included in the impairment evaluation as it equates to a functional loss. *Urry v. Walker & Fox Masonry Contractors,* 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989). Moreover, a physician's opinion is advisory only and is not binding upon the Commission. Id. Therefore, the Referee concludes, based largely on the testimony of Dr. Blaisdell as confirmed by Dr. Hill and in part corroborated by Dr. Sears, Dr. Goldberg and Claimant's testimony, that as a direct result of Claimant's accident and injury on October 21, 1982, Claimant suffers from a nine percent (9%) impairment of the whole person.

II

The next issue is whether, within the meaning of I.C. § 72-403 Claimant is precluded from receiving permanent partial disability benefits for refusal to cross the picket line — which refusal resulted in his termination. I.C. § 72-403 provides:

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> 72-403. Penalty for malingering — Denial of compensation. — If a partially disabled employee refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or secured for him, he shall not be entitled to any compensation.

Defendant asserts that Claimant should be barred from receiving any compensation due to his refusal to work after suitable work was secured for him; i.e., Claimant, by his own refusal to cross the picket line and by his refusal to respond to Defendant's letter calling him to return to work should not now be awarded any compensation. Defendant further argues it should not be penalized because of conduct of the Claimant's own choosing.

In *Gray v. Louisiana-Pacific Corp.*, __ IWCD __ (Nov. 21, 1990), the Commission concluded that § 72-403 does not apply in the context of permanent partial disability benefits. As set forth in *Gray*, the legislative intent is that the statutory penalty applies only where a claimant is able to return to some type of work before he or she has stabilized and refuses and neglects to do so. In such a situation, the claimant has an obligation to engage in suitable work rather than place an unfair burden upon the defendant, surety or employer by requiring payment of total temporary disability benefits when, in fact, claimant could work. Indeed, former Justice Huntly expressed this concept in his concurrence in *Gomez v. Rangen's. Inc.*, 105 Idaho 337, 340, 670 P.2d 42, 45 (1983):

> It would make no sense to rule that a worker forfeits permanent partial disability entitlement . . . because of refusal to work for whatever reason — rather, a reading of the Code as a whole drives the conclusion that the

> legislature intended I.C. § 72403 to apply only to temporary total benefits.

An additional reason why § 72-403 should not apply to permanent disability benefits is that traditionally the assessment of a disability rating involves an appraisal of the injured employee's *present and probable future ability* to engage in gainful activity within a reasonable geographic area. Therefore, consideration must be given not only to the work Claimant was doing when he was fired, but also to the work he could have engaged in with Defendant Louisiana-Pacific and any other suitable work within a reasonable geographic area. Consequently, in *Gray* the Commission concluded that § 72-403 does not apply to permanent partial disability benefits. Moreover, there is no persuasive legal authority to the contrary. Indeed, according to Professor Larson:

> If the record shows no more than that the employee, having resumed regular employment after his injury, was fired for misconduct, with the impairment playing no part in the discharge, it will not support a finding of compensable disability. But if to this record there is added evidence that the claimant has been hampered by his impairment in obtaining or holding other employment, the question is not quite so one-sided.

2 A. Larson, *The Law of Workmen's Compensation* § 57.64(a). This rationale was cited in *Marsolek v. George A. Hormel Co.*, 438 N.W.2d, 922 (1989). In that case, Marsolek had resumed his lightduty employment after an industrial injury. Later the Hormel employees went on strike. Marsolek threatened physical and personal harm to employees attempting to cross the picket line and

was fired. The Minnesota Supreme Court concluded that a worker discharged for misconduct may not be forever deprived of benefits under that state's workers' compensation act if "it has become demonstrable that the employee's work-related disability is the cause of the employee's inability to find or hold new employment. Such a determination should be made upon consideration of the totality of the circumstances including the usual work search 'requirements'." *Id.* at 924. The Minnesota Supreme Court opinion in *Marsolek* therefore stands for the proposition that disability benefits will be awarded when the lost earning capacity is due not to employee misconduct, but from permanent impairment resulting from the industrial accident. The proposition is applicable in the present case where the medical evidence is uncontradicted that Claimant's impairment prevents him from returning to sawmill work of any kind.

III

Having concluded that § 72-403 does not apply to permanent disability benefits, the next consideration is the extent of Claimant's disability. In assessing all medical and non-medical factors pursuant to I.C. §§ 72-423, 72-425 and 72-430, the Referee concludes Claimant has suffered a permanent partial disability of thirty-five percent (35%) of the whole person, which includes the permanent partial impairment rating of nine percent (9%).

IV

The Referee recommends that the Commission enter the following Proposed Order.

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PROPOSED ORDER

IT IS HEREBY ORDERED that Claimant is entitled to permanent partial disability benefits in the amount of thirty-five percent (35%) of the whole person, consistent with the foregoing Findings of Fact and Conclusions of Law.

DATED at Boise, Idaho, this 4th day of June, 1991.

INDUSTRIAL COMMISSION

s/Peggy McMahon
Peggy McMahon, Referee

Appendix E

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of June, 1991, a true and correct copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PROPOSED ORDER, was served by regular United States Mail upon each of the following:

Steven C. Verby, Esq.
P. O. Box 1005
Sandpoint, Idaho 83864

Starr Kelso, Esq.
Sims, Liesche, Newell, Kelso
Cartwright, Wallace & Wallace
P. O. Box 2127
Coeur d'Alene, Idaho 83814-1913

s/ illegible
Assistant Secretary

mcc

Appendix E

BEFORE THE INDUSTRIAL COMMISSION

STATE OF IDAHO

IC 82-412387

BURTON BAKER,

Claimant,

vs.

LOUISIANA-PACIFIC CORPORATION,

Self-Insured Employer,

Defendant.

ORDER

The Commissioners received the Findings of Fact, Conclusions of Law, and Proposed Order submitted for their review by Industrial Commission Referee Peggy McMahon on June 4, 1991.

Subsequently, each of the undersigned Commissioners conducted a *de novo* review of the record, independently considered the evidence presented and the arguments of counsel, and studied the applicable principles of law.

Thereafter, the undersigned Commissioners met on June 10, 1991, to decide this matter, giving due attention in their collective deliberations to the evidence presented by the parties and the legal principles pertaining thereto.

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Having reviewed the record in light of the applicable law, this Commission now concurs in the Referee's Findings of Fact and agrees with the Referee's Conclusions of Law. Therefore, the Commission adopts and confirms the Referee's Findings of Fact and Conclusions of Law as its own. Further, the Commission decides that the Order proposed by the Referee is appropriate in all respects.

Therefore, the Commission orders that Claimant is entitled to permanent partial disability benefits in the amount of thirty-five percent (35%) of the whole person, which includes an impairment rating of nine percent (9%).

DATED and FILED at Boise, Idaho, this 11th day of June, 1991.

INDUSTRIAL COMMISSION

_____
Gerald A. Geddes, Chairman

s/ Logan Lanham
Logan E. Lanham, Member

s/ Betty H. Richardson
Betty H. Richardson Member

ATTEST:

s/ illegible
Assistant Secretary

Appendix E

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of June, 1991, a true and correct copy of the foregoing ORDER was served by regular United States Mail upon each of the following:

Steven C. Verby, Esq.
P. O. Box 1005
Sandpoint, Idaho 83864

Starr Kelso, Esq.
Sims, Liesche, Newell, Kelso
Cartwright, Wallace & Wallace
P. O. Box 2127
Coeur d'Alene, Idaho 83814-1913

s/ illegible
Assistant Secretary

APPENDIX F — *BAKER V. LOUISIANA-PACIFIC*, APPELLANT'S BRIEF DATED NOVEMBER 20, 1990

BEFORE THE SUPREME COURT
STATE OF IDAHO

SUPREME COURT DOCKET NO. 19430

APPELLANT'S BRIEF

BURTON BAKER,

Claimant/Respondent,

vs.

LOUISIANA-PACIFIC CORPORATION,

Defendant/Appellant.

APPELLANT LOUISIANA-PACIFIC
CORPORATION'S BRIEF

Appeal from the Industrial Commission

State of Idaho

CHAIRMAN GERALD GEDDES, Presiding

STARR KELSO
SIMS, LIESCHE, NEWELL,
KELSO,
WALLACE & WALLACE, P.A.
PO BOX 2127
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ATTORNEY FOR APPELLANT

STEVEN C. VERBY
VERBY LAW FIRM
PO BOX 1005
SANDPOINT, IDAHO 83864

ATTORNEY FOR
RESPONDENT

Appendix F

STATEMENT OF THE CASE

While working for Louisiana-Pacific Corporation in October 1982, Claimant Burton Baker suffered fractures of both wrists in a fall. Claimant completely recovered and returned to full-time work for Louisiana-Pacific at the same pay and in the same position as he held before the industrial accident. When employees of Louisiana-Pacific went on strike, Claimant refused to cross the picket line and chose not to return to work, later obtaining a job with the United States Forest Service where he is employed at the present time.

Several years after the industrial accident, even though his wrist condition had not required further medical treatment, Claimant sought a determination of permanent partial impairment and disability. After a hearing held October 11, 1990, the Industrial Commission concluded that Claimant suffered a thirty-five percent permanent partial disability attributable to the 1982 industrial accident.

Under Idaho Code § 72-403, a partially disabled employee is not entitled to compensation if he refuses or neglects to work when suitable work is offered to him. Since Claimant voluntarily took other work at lower pay, he is not entitled to permanent partial disability benefits from Louisiana-Pacific. In addition, Claimant's current disability in excess of impairment resulted not from the 1982 industrial accident, but solely from his choice not to return to his former employment. Louisiana-Pacific also disputes the extent of impairment and disability determined by the Industrial Commission.

COURSE OF PROCEEDINGS BELOW AND FACTS

On October 21, 1982, while working for Louisiana-Pacific in

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Moyie Springs, Idaho, Claimant fell approximately ten feet from a flat roof, landing primarily on his hands and fracturing both wrists. (Clerk's Record, p. 100.) Claimant received temporary total disability benefits until March 1, 1983, when his treating physician, Dr. James R. Hill of Bonners Ferry, Idaho, released him to full-time work. (Clerk's Record, p. 45.) Claimant returned to his regular job of edgerman at his pre-injury wage and did not seek further medical treatment after returning to work. (Clerk's Record, p. 46.) After a period of adjustment lasting about a month, Claimant had no difficulties with his wrists in performing his job as edgerman. (Clerk's Record, p. 101.)

On *June 27, 1983,* employees of Louisiana Pacific went on strike. (Clerk's Record, p. 101.) As treasurer of the local union and former president of the Inland Empire District Council of the LPIU for three years, Claimant refused to cross the picket line. Claimant later received a letter from Louisiana-Pacific informing him to return to work by August 22, 1983, or his job would be filled. Claimant neither responded to the letter nor sought further employment with Louisiana-Pacific. (Clerk's Record, p. 46.)

Three days after the deadline for returning to work, Claimant saw Dr. Hill and told him that he would like to get into an exercise program. After examining both arms, Dr. Hill informed Claimant that his arms were fine and that he could do anything that he wanted. (Clerk's Record, p. 47.) Dr. Hill also ordered x-rays. (Defendant's Exhibit R, p. 2) On September 29, 1983, Dr. Hill advised Louisiana-Pacific that in his opinion Claimant would have no permanent disability. (Defendant's Exhibit R, p. 6.)

The next time that Dr. Hill saw Claimant was on *March 7, 1986,* for a civil service physical examination for the United States Forest Service position of Forestry Technician, the position which

Claimant still holds. Dr. Hill certified that Claimant could work with no restrictions. (Clerk's Record, p. 102.)

While still on strike, Claimant received strike pay. On April 29, 1984, he began his job with the United States Forest Service as a Forestry Technician. (Clerk's Record, p. 47.) When Claimant began employment for the Forest Service, he signed an oath agreeing to refrain from participating in a strike against the Forest Service or any other government agency. (Clerk's Record, p. 47.)

Claimant's work for the Forest Service included fire suppression duties involving digging, chopping, hiking, breathing smoke and dust, and working long, arduous hours. (Clerk's Record, p. 102.) The tools he used included a shovel and a pulaski. According to the report of Steven R. Hamman, a rehabilitation witness, the physical demand levels of both "sawmill workers" and "forester aides" are in the "medium" category, requiring lifting and carrying of up to 50 pounds. (Claimant's Exhibit 5, pp. 2-3.) whereas the physical demands of a forestry technician are in the "heavy" category.

More than four years after the industrial accident, on March 26, 1987, Claimant was referred by his attorney to Dr. James Brinkman of Spokane for evaluation of his wrist condition. Dr. Brinkman requested nerve conduction studies which did not reveal an electrical abnormality. Dr. Brinkman also ordered x-rays which showed no evidence of arthritis in the right wrist or left forearm and wrist. In a letter to Claimant's attorney dated July 6, 1987, Dr. Brinkman related that Claimant had a chronic low grade median nerve compression syndrome and that if he were bothered with numbness, tingling, or wakefulness at night, he should be re-examined in six months. With regard to post-traumatic arthritis Dr. Brinkman stated:

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> Although the development of post traumatic arthritis is a mathematical possibility, I would give it a very low percentage probability wise in view of the location of the fractures lines, which are remote from the radial carpal or wrist joint spaces and their current normal appearance on x-rays. It is my opinion that he has made a relatively good recovery from his bilateral fractures and does not have a significant disability associated with this injury.

(Defendant's Exhibit S, p. 10.)

Despite Dr. Brinkman's positive report regarding the medical condition of claimant's upper extremities, Claimant's counsel filed an Application For Hearing on September 25, 1987. (Clerk's Record, p. 1.)

On December 1, 1987, Claimant returned to see Dr. Hill at the request of Louisiana-Pacific. Claimant told Dr. Hill that he sometimes had involuntary opening of his left hand, causing him to drop things. Dr. Hill found Claimant's finger grips to be equal and found no tenderness about his arms and wrists bilaterally. X-rays revealed "possible mild degenerative" joint change and/or incongruity," and Dr. Hill noted that degenerative changes can slowly progress, but he saw no debilitating impairment at that time. (Defendant's Exhibit R, p. 2.).

Although he was examined three times by Dr. Hill in 1988 and 1989 for other ailments, Claimant made no further complaints that were noted in Dr. Hill's records concerning his arms or wrists. On September 4, 1989, Claimant saw Dr. Hill for back pain sustained

as a result of a fall in the woods. Claimant fell forward and landed on his hands, yet did not complain about pain in his hands, wrists, or arms according to Dr. Hill's records. (Defendant's Exhibit R, p. 2.)

On February 23, 1989, the Industrial Commission filed a Notice of Intention to Dismiss for lack of prosecution. (Clerk's Record, p.4.) Although Claimant had no apparent problems with his wrists, his attorney responded on March 7, 1989, with a Request For Calendaring. (Clerk's Record, p. 5.)

On August 25, 1989, Claimant was sent by his attorney to Dr. J.S. Blaisdell, a physician who makes his living by rating Claimant's disabilities. (Clerk's Record, p. 103.) Dr. Blaisdell stated that no change had occurred in the left wrist since shortly after treatment was discontinued following his industrial accident. (Claimant's Exhibit (Evaluation), p. 2.) He also noted that the Claimant had observed no change in the condition of the right arm since about a year following the industrial accident. (Claimant's Exhibit (Evaluation), p. 2.) Dr. Blaisdell's diagnosis was a healed fracture of the right radial shaft "with minimal angulation and shortening at the fracture site" and "probable fracture" of the left distal radius "with minimal shortening and possible early arthritic changes secondary to injury to the articular cartilage of the distal radius." (Claimant's Exhibit (Evaluation), p. 5.)

Dr. Blaisdell concluded that "in the absence of any evidence to the contrary" the diagnoses were the result of the industrial accident. He then made a "legal" and "medical" impairment rating:

> Based on Idaho Code 72-422 and 72-424 and being aware of a recent judicial ruling relative to pain; and with the benefit of over 45 years of

> experience in the field of orthopaedics; and with the aid of the AMA Guide, I conclude that this patient's impairment amounts to 14% of the whole person.

(Claimant's Exhibit (Evaluation), p. 6.)

In May, 1990, at the request of Claimant's counsel, Dr. Hill examined Dr. Blaisdell's records and found Claimant's symptomatology compatible with post-traumatic osteoarthritis of the left wrist with chronic pain and activity-limiting discomfort. (Defendant's Exhibit R, p. 10). In a second letter, again in response to a request of Claimant's counsel, Dr. Hill indicated that he agreed with Dr. Blaisdell's evaluation and report.

At the request of Louisiana-Pacific, Dr. Stephen R. Sears of the Spokane Orthopaedic & Fracture Clinic, examined Claimant on September 13, 1990. Based on minor loss of range of motion, Dr. Sears gave Claimant a rating of three percent of the right upper extremity and four percent of the left upper extremity, translating to four percent of the whole person. (Clerk's Record, p. 105.)

On October 8, 1990, Dr. Dennis Goldberg of Hayden, Idaho, evaluated Claimant at his request and rated claimant's impairment attributable to his wrists at between eight and twelve percent of the whole person. (Clerk's Record, p. 105.) Dr. Goldberg is a general practitioner with no special training and is not Board Certified in any area. (Dr. Goldberg Deposition, p. 14, l. 23-25; p. 15, l. 1; p. 24, l. 18-25; p. 25, l. 1-2.) At the time of the deposition, he had just moved to Idaho and was not familiar with the AMA Guides to the Evaluation of Permanent Impairment. (Clerk's Record, pp. 16-17.)

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Findings of the Industrial Commission

The Industrial Commission stated that whether Claimant had an impairment caused by his industrial accident was "undisputed." (Clerk's Record, p. 102.) The referee rated Claimant as having a four percent total body impairment, to which the Commission added five percent for pain and lifestyle losses, for total impairment of nine percent. (Clerk's Record, p. 106.)

Based upon the above medical impairment and Claimant's age, wage, level of education, and lack of transferrable skills, the Commission determined that Claimant suffered a permanent partial disability of thirty-five percent of the whole person. (Clerk's Record, p. 111.)

The Commission also determined that Claimant was not precluded from receiving *permanent partial disability* benefits by voluntarily giving up his job with Louisiana-Pacific on the basis that I.C. § 72-403 applies to temporary benefits only. (Clerk's Record, p. 115.) According to the Commission, the medical evidence was uncontradicted that Claimant's impairment prevented him from returning to sawmill work of any kind. (Clerk's Record, p. 114.)

ISSUES PRESENTED ON APPEAL

I

Did the Industrial Commission rely on substantial, competent evidence in determining that Claimant suffered more than minimal impairment as a result of his industrial accident?

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II

When a claimant voluntarily refuses suitable work in his regular employment at his regular wage, is he entitled to receive partlal disability benefits?

III

Was the determination of the Industrial Commission that Claimant suffered disability in excess of impairment as a result of his industrial accident supported by substantial, competent evidence?

ARGUMENT

I

The medical testimony did not establish that Claimant suffered more than a minimal impairment as a result of his 1982 industrial accident.

In its decision, the Industrial Commission stated that "[i]t is undisputed at this point in time that Claimant has an impairment from his industrial accident." (Clerk's Record, p. 102.) This statement is in error. A careful examination of the record reveals that Claimant's total body impairment even today is minimal. The Idaho Supreme Court has repeatedly held that it will not set aside findings of fact by the Industrial Commission if they are based upon substantial, competent evidence. *Hewson v. Asker's Thrift Shop,* __ Idaho __, 814 P.2d 424, 426 (1991). We urge the Court to carefully review the medical evidence in this case for the reason

that Claimant has not sought treatment for his wrist condition since his industrial accident, with the exception of a visit to his treating physician in 1983 requesting an exercise program. All of his other examinations by doctors since leaving the employ of Louisiana-Pacific in 1983 have been requested by counsel for evaluation purposes in relation to his worker's compensation hearing.

Without repeating all of the details of medical evaluations already described in the facts, we will briefly highlight the most salient facts.

A. *Dr. Hill's 1990 "evaluation" and "examination" of Claimant is without validity.*

Dr. Hill treated Claimant on the date of his industrial accident and through Claimant's recovery period. Since this included Claimant's stay in the hospital, several office visits, and the taking of a number of x-rays, Dr. Hill was very familiar with Claimant's condition. Shortly after examining Claimant on August 25, 1983, and after reviewing x-rays, Dr. Hill informed Louisiana-Pacific that "I do not feel that Burton Baker will have any permanent disability." (Defendant's Exhibit R, p. 6.) Dr. In December 1987, at the request of Louisiana-Pacific Corporation, Claimant was examined by Dr. Hill concerning complaints of his left hand occasionally opening involuntarily and aching in his wrists at times. (Defendant's Exhibit R, p. 2.) After reviewing x-rays taken in conjunction with Claimant's examination, Dr. Hill reported to Louisiana-Pacific that further medical treatment was unnecessary and that Claimant had no "debilitating impairment." (Defendant's Exhibit R, p. 8.)

On May 25, 1990, Dr. Hill wrote a letter to Claimant's counsel concerning Claimant's condition. Although Dr. Hill wrote of examining the patient, *in actuality* Dr. Hill had not personally

examined Claimant *since 1987* when he stated that he had "no dehabilitating impairment." He merely restated Dr. Blaisdell's examination from his report and made it appear that he had reexamined the Claimant. Clearly the reason he did this was to avoid being deposed. (Dr. Hill Deposition, p. 35, l. 16-20; p. 36, l. 11-25; p. 37, l. 1-4.) In addition, Dr. Brinkman's report had not been provided to Dr. Hill when he made his 1990 evaluation.

B. *Dr. Brinkman, claimant's expert, found no significant disability.*

Dr. Brinkman is a practicing Board Certified surgeon and plastic surgeon specializing in surgery of the hand to whom Claimant was referred by his attorney. (Clerk's Record, p. 53.) According to Dr. Brinkman's report of July 6, 1987, after having reviewed all the x-rays available at that time, Claimant had a "very low" probability of developing post-traumatic arthritis. Although he mentioned a chronic low grade median nerve compression syndrome, this has not been reported by any physicians as an impairment. Dr. Brinkman's opinion was that Claimant had no "significant disability associated with this injury." (Defendant's Exhibit S, p. 10.)

C. *Dr. Blaisdell's finding of 14 percent total body impairment was based in part upon false information.*

Dr. Blaisdell was under the misunderstanding that Claimant had never returned to his regular employment after his injury. He used this misinformation in his impairment rating of Claimant. Based on lost employment, lost health insurance, and lost retirement from Louisiana-Pacific, Dr. Blaisdell added three percent of the whole person to his impairment rating. (Dr. Blaisdell Deposition, p. 16, l. 4-25; p. 17, l. 1-25; p. 18, l. 1-24.)

Dr. Blaisdell further assigned three percent of the whole person to pain. Dr. Blaisdell was not aware, however, that Claimant had not been prescribed pain medication for his wrist condition. (Dr. Blaisdell Deposition, p. 20, l. 20-24; p. 78, l. 17-20.)

Finally, although Dr. Blaisdell was of the opinion that Claimant's wrist condition had not changed since one year following the industrial accident, his evaluation differs markedly from that of Dr. Brinkman. (Dr. Blaisdell's Deposition, p. 12, l. 6-10; p. 14, l. 5-11).

D. *Dr. Goldberg's deposition reveals his lack of experience and expertise in rating impairment.*

We have already discussed Dr. Goldberg's lack of experience with the AMA guides. In addition, in his deposition, Dr. Goldberg variously rates Claimant's impairment as anywhere from four percent of the whole person to twenty-five percent of the whole person, with several ratings in between those figures. (Dr. Goldberg Deposition, p. 66, l. 4; p. 64, l. 21; also see p. 63.)

E. *Contrary to the statement of the Industrial Commission Dr. Sears specifically addressed the factor of pain in his report.*

The Industrial Commission concluded that Claimant suffers a minimum of four percent impairment of the whole person and proceeded to add five percent for pain and "lifestyle" losses. (Clerk's Record, p. 106.) This conclusion is in error. Dr. Sears whose estimates amounted to a four percent total whole body impairment, specifically addressed pain in his September 13, 1990 report:

Present complaints: Mr. Baker takes no

> medication for his wrist pain. I asked him why it is that he did not take arthritic medication if he was having pain in his wrist and his answer is "the pain hasn't bothered me that much yet."

(Defendant's Exhibit T, p. 2.) Dr. Sears also noted that Claimant exhibited no pain behavior when he made his best efforts at range of motion. (Defendant's Exhibit T, p. 3.)

Over nine years since his industrial accident, Claimant's medical condition has not necessitated treatment since he left the employ of Louisiana-Pacific, not even pain medication. Based upon the credible evidence presented by Dr. Brinkman and Dr. Sears, in conjunction with the unbiased pre-litigation reports of Dr. Hill, Claimant has suffered minimal permanent impairment. This is despite years of trauma to the wrists shoveling, using a pulaski, and performing other admittedly strenuous work in Claimant's job as Forestry Technician. If Claimant has suffered an impairment, based upon the medical evidence, it is pure conjecture to attribute his current condition to his 1982 injury.

II

> Under Idaho Code § 72-403, Claimant is precluded from receiving worker's compensation benefits by his refusal or neglect to perform suitable work offered by his employer.

A. *Idaho Code § 72-403 prohibits Claimant from receiving worker's compensation benefits.*

Claimant is not entitled to partial disability benefits when he

suffers a wage loss due to his choices to refuse suitable work and to engage in seasonal employment at lower wages. This policy is reflected in the enactment of I.C. § 72-403:

> 72-403. Penalty for malingering — Denial of compensation. — If a partially disabled employee refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or secured for him, he shall not be entitled to any compensation.

The application and interpretation of I.C. § 72-403 is one of first impression in the State of Idaho. The Idaho Supreme Court was presented with the issue of the application of I.C. § 72-403 in *Gomez v. Rangen's Inc.*, 105 Idaho 337, 340, 670 P.2d 42, 45 (1983), but remanded the case to the Industrial Commission for entry of findings supporting the Commission's ruling. Although the Industrial Commission has addressed this issue in *Gray v. Louisiana-Pacific Corp., I.C. No. 87-591209* (November 21, 1990), the decisions of the Industrial Commission are not binding upon the Supreme Court. (See the decision attached for the Court's convenience).

In construing statutes, courts must give effect to legislative intent. *Hewson v. Asker's Thrift Shop,* Idaho , 814 P.2d 424, 427 (1991); *Carpenter v. Twin Falls County,* 107 Idaho 575, 691 P.2d 1190, 1197 (1984). When the language of the statute is unambiguous, the primary cannon of statutory construction is that the court has no occasion for interpretation, but must adhere to the clear expression of legislative intent. *Ottesen on Behalf of Edwards v. Board of Commissioners of Madison County,* 107 Idaho 1099, 695 P.2d 1238, 1239 (1985).

In this case, no ambiguity exists. The conclusion of the Industrial Commission is that "partially disabled" refers only to temporary partial disability. This definition is not supportable. There is no basis for such a narrow interpretation and it is submitted that such an arbitrary result was not the intent of the legislation.

The Industrial Commission reasons that when Claimant is temporarily disabled and able to return to work, the surety or employer is unfairly burdened if it must pay total disability benefits when the Claimant refuses or neglects to work.

The Industrial Commission's interpretation of I.C. § 72-403 is too narrow. The term "compensation" as defined in the Idaho Code is extremely broad. Although Louisiana-Pacific has voluntarily paid Claimant for his permanent *impairment* resulting from his industrial accident, it cannot concede that a surety or employer must be liable for disability above impairment when, as in this case, the Claimant's wage loss is due to his own choice to not return to his regular employment and not due to his impairment.

At the time Claimant left the employ of Louisiana-Pacific, he was fully capable of full-time work in his regular employment, a job rated in the "medium" category as far as lifting and carrying. In his current employment, he is in a position also rated, at least, in the "medium" category in regard to lifting and carrying. Although the Industrial Commission downplays the extent of physical exertion required in his current employment, the fact is that he performed the more arduous tasks, such as use of a pulaski, for several years without problems.

Who is to say how Claimant would have fared had he remained in his employment with Louisiana-Pacific. In other

words, as discussed more fully below, the chain of causation was broken when Claimant chose to leave the employ of Louisiana-Pacific. Attempts several years later to attribute Claimant's alleged disability to his 1982 industrial accident are pure conjecture.

In construing a statute, the Court may examine the language used, the reasonableness of the proposed interpretations, and policy behind the statute. *Umphrey v. Sprinkel,* 106 Idaho 700, 682 P.2d 1247, 1253 (1983).

It is not presumed that the legislature performed an idle act of enacting a superfluous statute; thus, it is incumbent upon the Supreme Court to give statutes an interpretation that will not nullify it. *Eby By and Through Eby v. Newcome* 116 Idaho 838, 780 P.2d 589, 592 (1989).

The Industrial Commission has effectively nullified I.C. § 72-403 by refusing to apply the stature in this case or in any other case. Awarding Claimant benefits for permanent partial impairment, but not disability beyond impairment by reason of misconduct or refusal to work, is a reasonable interpretation of I.C. § 72-403, particularly under the facts of this case.

The Industrial Commission relies on *Larson's Workmen's Compensation Law* and case law from other jurisdictions to support its determination that I.C. § 72-403 does not apply to permanent partial impairment and disability. However, the general rule is that if an "employee, having resumed regular employment after his injury, was fired for misconduct, with the impairment playing no part in the discharge, it will not support a finding of compensable disability." 2 A. Larson, *The Law of Workmen's Compensation* 57.64(a), at 10-264 (1989). This general rule was drafted into the Idaho Workmen's Compensation Act as evidenced by I.C. § 72-403.

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Larson notes that the general rule is not as clear-cut when the claimant is hampered by his impairment from obtaining other employment. *Id.* Whether the claimant receives benefits may depend upon the reason he left his regular employment, whether he actively seeks employment, whether he was performing light-duty work because of his impairment, and most certainly, the statutes in the jurisdiction. *See generally,* 2 A. Larson, *The Law of Workmen's Compensation* 57.64(b)-(c), at 10-269 to 284.

Idaho would not be alone in determining that a claimant forfeits his right to worker's compensation benefits when he is fired or voluntarily leaves his employment even if he is unable to obtain other work because of his impairment. *See, e.g., Powers v. Department of Employment Services,* 566 A.2d 1068 (D.C. App. 1989); *Calvert v. General Motors Corp.,* 327 N.W. 2d 542 (Mich. App. 1983); *Pearl v. Builders Iron Foundry,* 55 A.2d 282 (R.I. 1947). Thus, the law is less clear-cut in this area than the Industrial Commission would lead one to believe.

Besides Larson's, the Industrial Commission cited a Minnesota case, *Marsolek v. George A. Hormel Co.,* 438 N.W.2d 922 (Minn. 1989), stating that the case "stands for the proposition that disability benefits will be awarded when the lost earning capacity is due not to employee misconduct, but from permanent impairment resulting from the industrial accident." (Clerk's Record, p. 114.) In *Marsolek* the claimant, who had work-related injuries to his knee and back, returned to work, but was subsequently assigned light-duty work because he was unable to perform his regular duties. The claimant was later fired for misconduct while on strike when he threatened to damage cars and injure employees who attempted to cross the picket line. Although *Marsolek* involves a claimant who went on strike and did not return to his employment, the similarity with this case ends there because he could not perform his regular job.

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Permanent disability was not at issue in *Marsolek*; the case involved temporary benefits which the worker's compensation judge had awarded from the date the claimant began actively seeking work after his dismissal. Clearly, I.C. § 72-403 would preclude an award of benefits in this situation according to the holding of the Industrial Commission. Thus, *Marsolek* cannot stand for the proposition that a claimant is entitled to disability benefits when lost earning capacity is due to permanent impairment.

Even under *Marsolek*, a claimant who is justifiably discharged for misconduct cannot receive benefits unless he can show that his work-related impairment is the cause of his inability to find or hold new employment. *Marsolek*, 438 N.W.2d at 924. The Industrial Commission found that the medical evidence in this case was "uncontradicted that Claimant's impairment prevents him from returning to sawmill work of any kind." (Clerk's Record, p. 114.) That finding is clearly erroneous given the established and admitted fact that Claimant actually returned to his pre-injury employment and at the time of the strike was performing his job without any problem. His own physician, Dr. Hill, told him that "he could do anything he wanted". (Clerk's Record, p. 46). As explained below, Claimant has not shown that his impairment has resulted in disability beyond impairment.

B. *Claimant's present disability was not caused by his industrial accident.*

To obtain permanent disability benefits, Claimant must show that his disability resulted from an accident arising out of and in the course of his employment. *Neufeld v. Browning Ferris Indus.*, 109 Idaho 899, 712 P.2d 600 (1985). Medical proof must establish such causal connection by a reasonable medical probability, not just a

possible causal connection between the accident and the disability. *Green v. Columbia Foods, Inc.*, 104 Idaho 204, 657 P.2d 1072, 1073.

In this case, Claimant's wage loss resulted from his choice not to return to his employment with Louisiana-Pacific rather than his medical impairment. The facts are uncontroverted that Claimant fully recovered from his industrial accident, that Claimant returned to his pre-injury job at pre-injury pay, and that he worked full-time without difficulty in that position until the June, 1983 strike. After years of frequently strenuous labor involving use of a pulaski and shovel, and with minimal objective findings of physical impairment, claimant has now garnered a thirty-five percent disability rating largely because he chose seasonal employment. Thus, although on the one hand a surety or employer should not escape payment for permanent impairment attributed to employment, on the other hand it should not be required to pay for wage loss chosen by the claimant.

Most of the cases in other jurisdictions ruling on the issue involve wage loss occurring soon after the industrial accident. In *Bryant v. Industrial Commission*, 21 Ariz. App. 356, 519 P.2d 209 (1974), however, the facts are similar to this case in that the claimant sought benefits several years after the industrial accident. In 1962 the claimant suffered a compensable injury and was determined to be ten percent permanently partially disabled with no loss of earning power. He returned to his former employment at the same rate of pay. In 1966 he changed employers, but his pay remained the same. In 1971 he voluntarily terminated his employment to accept a better job, which did not materialize. Claimant sought a readjustment of benefits for loss of earning power. The court in *Bryant* denied benefits, stating that when a worker's changed economic status is of his own making he is not entitled to disability benefits.

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If nothing more, I.C. § 72-403 reflects a legislative intent that if a worker suffers a wage loss due to events of his own choosing unrelated to his industrial accident, he should not be compensated.

III

The Industrial Commission's determination that Claimant suffered disability in excess of impairment is not supported by substantial and competent evidence.

A. *The non-medical factors do not support the Industrial Commission's determination of thirty-five percent disability.*

There are three pertinent sections of the Idaho Code that deal with assessing permanent disability under Worker's Compensation Law. I.C.§ 72-423 states "permanent disability' results "when the actual or presumed ability to engage in gainful activity is reduced or absent because of a permanent impairment and no fundamental or marked change in the future can be reasonably expected."

In addition, I.C. § 72-425 states that the "evaluation (rating of) of a permanent disability" is "an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent non-medical factors provided in § 72-430, Idaho Code."

Lastly, I.C. § 72-430 states that matters to be considered in determining percentages of permanent disabilities include the nature of the physical disablement, the accumulative effect of multiple injuries, the occupation of the employee, his age at the

time of the accident causing the injury, and the diminished ability of the afflicted employee to compete in an open labor market within a reasonable geographic area, considering the personal and economic circumstances of the employee.

In essence, what these three sections taken together mean is that in determining whether a Claimant is entitled to any disability in excess of impairment we must determine what, if any, impact the impairment had upon Claimant in light of the nonmedical factors such as age, sex, education, economic and social environment. *Urry v. Walker & Fox Masonry Contractors,* 115 Idaho 750, 769 P.2d 1122, 1125 (1989). The test for determining disability is "whether the physical impairment taken in conjunction with non-medical factors has reduced the Claimant's capacity for gainful activity." *Seese v Ideal of Idaho. Inc.,* 110 Idaho 32, 714 P.2d 1, 3. (1985).

B. *At the time of the accident and after his full recovery the Claimant was capable of performing at least medium physically demanding work.*

Claimant at the time of the accident was 44 years of age and was employed as an edgerman. Steve Hamman, the Claimant's rehabilitation witness stated, in his report, (Hamman deposition, Exhibit No. 2) that he felt that the closest Dictionary of Occupational Titles description of this position was "sawmill worker," DOT No. 667.686-014. According to Mr. Hamman, this position was described by the DOT as follows:

> A semi-skilled occupation requiring minimal mathematical and language usage and requiring physical demand levels of medium, (lifting/carrying up to 50 pounds) and

> extensive reaching/handling, fingering/ feeling, and adequate visual ability."

Dr. Blaisdell's opinion letter, graphically informs us of what Claimant told him about his injury not affecting his ability to work after his injury at his pre-injury job:

> He returned to work for the same employer about 6 months following the accident. *For the first month, he found it difficult to operate the edge-chipper which was his regular iob. After that period, he was able to operate that machine without difficulty.*

(Claimant's Exhibit 1, p. 2, para. 3 (emphasis added)).

Dr. Blaisdell clearly described the Claimant's ability to operate his machine upon his return to work in all probability as he had been informed by Claimant. Obviously, Dr. Blaisdell's report that Claimant "was able to operate that machine without difficulty" causes major problems for the claim that he can do only light-sedentary duty type work and his later assertion that his arm bothered him.

Other than using a pulaski, which is optional, the Claimant testified after being referred to his earlier deposition, that he could perform all of the work necessary as a fire fighter for the United States Forest Service. (Hr. Tran. p. 124, l. 20-25; p. 125, l. 1-9).

Mr. Hamman testified that pursuant to the Dictionary of Occupational Titles and the Selective Characteristics of Occupations, which are the books that he utilized as his resource in preparing his report, entry no. 452.687-014 would be the proper

listing for a USFS fire-fighter. (Steve Hamman Deposition, p. 22, l. 19-25; p. 23, l. 1-5). Mr. Hamman explained that the information found at that listing would describe the physical requirements of a fire-fighter position. Mr. Hamman testified using this resource, to the following:

> A. (Complies) In answer to your question, its rated by the Dictionary of Occupational Titles as a *heavy* job requiring lifting, carrying a maximum of 100 pounds at a time; also requiring considerable stooping, kneeling, crouching, crawling, reaching, handling, fingering and feeling, and climbing and balancing. Its conducted outside with a considerable number of hazards; requires minimum levels of math and language of element, and it is unskilled."

(Steve Hamman Deposition, p. 23, l. 15-24).

Claimant by his own testimony was capable of performing all aspects of the fire-fighter job including using a "ground-pounder" pulaski through 1986. He further testified that thereafter he was capable of doing all aspects of the job through the hearing date by utilizing a shovel instead of the pulaksi and that this was entirely appropriate and optional.

A review of the United States Civil Service Examination completed by Dr. Hill on March 7, 1986 (Dr. Hill Deposition Exhibit A) shows that the job description approved by Dr. Hill for the Claimant closely mirrors the DOT description.

In analyzing Claimant's work abilities after the accident and

in determining what extent, if at all, Claimant's impairment has reduced his capacity for gainful employment, actions speak louder than words. By his own actions, the Claimant has shown that any impairment he suffered in the accident did not affect his capacity for work. Not only was he able to work at his pre-injury job, but he has also proven himself capable of performing *heavy* physical activity as a fire-fighter over the last seven years. We do not have to theorize what level of work Claimant can perform. His actual work has shown us that not only can he engage in medium level work, he can, and has been doing, *heavy* work.

C. *The assumptions on which Claimant's vocational expert based his opinions are incorrect.*

Mr. Hamman, Claimant's vocational expert, testified quite candidly that his report is only as good as the assumptions and the information upon which it is based. If his assumptions and information are incorrect, his reports and opinions are invalid.

Mr. Hamman's whole report and opinion were based upon the assumption that the Claimant was only capable of performing light or sedentary work. (Steve Hamman Deposition, Exhibit 2, p. 3, para. 3) . In forming his opinions, Mr. Hamman did not use the report of Dr. Brinkman, the September 29, 1983 report and the January 12, 1989 report of Dr. Hill, the civil service physical examination report performed by Dr. Hill, or the report of Dr. Sears.

> "Q. When you arrive at a disability evaluation do you consider what the person's functional capacities are?
>
> A. Yes.

Q. And in doing so with regard to Mr. Baker, what did you utilize?

A. I utilized Dr. Blaisdell's report and physical capacities evaluation form of August 25, 1989 and Dr. Hill's agreement with that, which was stated in June 25, 1990.

Mr. Hamman testified that if the Claimant did not lose his ability to perform medium level work or greater work, that his report was invalid.

"Q. Isn't it true, Mr. Hamman, that your opinion as to disability in this case is based in part upon the premise that as a result of the October 21, 1982 accident, Mr. Baker lost the ability to perform medium level or greater work capacity?

A. Yes.

Q. And isn't it true, Mr. Hamman, that if in fact this premise is erroneous and in fact Mr. Baker did not lose the ability to perform medium level or greater work activity, that your disability opinion would be invalid.

A. Yes."

(Steve Hammon Deposition, p. 20, l.10-21).

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The actual facts are that Claimant did not lose the capacity to do medium level work.

D. *The objective evidence does not show that Claimant's ability to work was affected by his medical impairment.*

Claimant maintained Dr. Hill as his family physician. He saw him in 1988 and 1989 and the records of Dr. Hill reflect no visits in 1990. Claimant saw no physicians other than Dr. Hill for treatment from the time of the accident through the hearing. At no time after Claimant was released to return to work on March 1, 1983 was it necessary for the Claimant to seek help for problems caused by his injury.

The Claimant, in an attempt to show that the injury had affected his ability to work, presented testimony of Nan Berger, one of his supervisors. She testified that when Claimant used an increment bore that "he just seemed different the way he handled it." (Hr. Tran. p. 27, l. 9-12). However, she later testified that one of Claimant's duties was to train new workers on the proper use of the increment bore. (Hr. Tran. p. 64, l. 22-24). If, the Claimant was the person designated to train new workers in the use of a particular instrument it would seem that he would be first required to know how to properly use the instrument.

Ms. Berger also testified that on one occasion she observed the Claimant using a shovel and he looked awkward. She also testified that Claimant doesn't plant trees or use a pulaski. She didn't testify why he didn't do those activities but she did testify that at least during July, August and September, the general fire season, that she was not Claimant's supervisor. (Hr. Tran. p. 54, 55, 56). Instead Ms. Berger testified that there were times when he worked under the supervision of other people. (Hr. Tran. p. 54, l. 18-19). Ms.

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Berger's final conclusion of Ms. Berger's concerning Claimant's ability to do his job tasks, however, was quite favorable.

> "Q. As I understand your testimony correct me if I'm wrong, it is your testimony earlier that from your position as Mr. Baker's supervisor that he was adequately able to perform the duties for which you were supervising him.
>
> A. Uh-huh.
>
> Q. Is that a yes?
>
> A. Yes."

(Hr. Tran. p. 65, l. 22-25; p. 66, l. 1-4).

Claimant tried to establish the effect of his injury by testifying that he had to stop playing the accordion and golf. On cross-examination he reluctantly recalled that he could still play the accordion.

> "Q. Isn't it true, Mr. Baker, that you told Mr. Steve Hamman that you still play the accordion for up to 10 minutes at a time?
>
> A. I have tried it and I can't play it.
>
> Q. I guess my question was Mr. Baker, isn't it true that you told Mr. Hamman that you could play the accordion for up to 10 minutes?

A. Yes."

(Hr. Tran. p. 126, l. 5-12).

On cross-examination he also read his deposition taken previously to reveal that when he had it taken on October 11, 1990 he could not recall being unable to still play golf. In fact, if his injuries did affect his golf, it certainly did not affect his ability to cross-country ski. While Claimant did not mention cross-country skiing as a pastime of his, Dr. Hill did. (Hr. Tran. p. 19). Also, in 1986, the Claimant picked up a new sport that is difficult on his hands and wrists, mountain biking. (Hr. Tran. p. 126, l. 13-18).

CONCLUSION

Claimant suffered minimal impairment of the whole person pursuant to the opinions of Dr. Brinkman, Dr. Hill, and Dr. Sears. In addition, Claimant is not entitled to disability in excess of impairment. Claimant failed to present prima facie evidence of wage loss. Claimant, by his own testimony and his work history, is physically capable of doing at least the same medium level of work he was able to do prior to his injury.

Moreover, under I.C. § 72-403, Claimant is precluded from receiving compensation for partial disability beyond impairment when his wage loss is attributable to refusal to return to work. If the Court rules, that I.C. § 72-403 is inapplicable, it should nonetheless look to the statute for guidance, since it seems to reflect a legislative intent that, if wage loss is due to conduct unrelated to injury, Claimant is limited in the disability he can attribute to the industrial accident. Any impairment Claimant may have suffered from his accident is pure speculation and conjecture at this point given the absolute clear bill of health he has received

all of these years. Now substantial and competent causal relationship was ever established. The decision of the Industrial Commission should be reversed.

RESPECTFULLY submitted this __ day of October, 1991.

SIMS, LIESCHE, NEWELL, KELSO,
WALLACE & WALLACE, P.A.

_____

STARR KELSO

CERTIFICATE OF MAILING:

I hereby certify that a true and correct copy of the foregoing document was mailed via regular mail, postage prepaid on the __ day of October, 1991, to:

STEVEN C. VERBY
Attorney at Law
P. O. Box 1005
Sandpoint, Idaho 83864

BY: _____

Appendix F

BEFORE THE INDUSTRIAL COMMISSION

STATE OF IDAHO

IC 87-591209

MATTHEW J. GRAY,

Claimant,

vs.

LOUISIANA-PACIFIC CORPORATION,

Self-Insured/Employer,
Defendant.

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

The subject matter of this case involves the extent of Claimant's impairment and disability. Defendant Employer further alleges Claimant should be denied disability benefits because he is a malingerer within the meaning of I.C. § 72-403.

Referee Peggy McMahon heard the case in Post Falls, Idaho on June 19, 1990. Claimant was present in person and represented by Michael J. Vrable of Hayden, Idaho. Defendant Employer, was represented by Starr Kelso of Coeur d'Alene, Idaho. No post-hearing testimony has been presented under the rules. Having considered the record established in the case and the arguments of counsel submitted in their briefs, Referee Peggy McMahon submits the following proposed Findings of Fact, Conclusions of Law and Order which she recommends the Commission adopt as its Decision and Order.

Appendix F

ISSUES

The following matters are at issue:

1. The extent of Claimant's impairment;

2. The extent of Claimant's disability, if any; including a determination whether Claimant is precluded from receiving disability benefits pursuant to I.C. § 72-403; and,

3. Whether Claimant is entitled to attorney fees, pursuant to I.C. § 72-804.

EVIDENCE CONSIDERED

The record in this case and evidence considered is as follows:

1. The oral testimony of Linda Graf, Tammara Devereaux, Steven Warren and Claimant presented at hearing; and,

2. Exhibits 1 - 6 and A - O presented at hearing, including the exhibits attached to Exhibit 6 which is the pre-hearing deposition of Dr. John J. Callahan.

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FINDINGS OF FACT

I.

Claimant, Matthew J. Gray of Coeur d'Alene, Idaho, was born on April 21, 1958, and is presently 32 years of age. He is divorced and has one dependent child. While Claimant has completed the tenth grade, he has not obtained a GED. Since high school, Claimant's employment has been primarily physical labor and construction, progressing ultimately to millwright work. He learned the latter occupation from on-the-job training for about ten years, coupled with night classes in welding and blueprint reading at North Idaho College. Claimant lost his left index finger through amputation as a result of a prior industrial accident. He is right handed.

II.

Claimant began employment with Defendant, Self-Insured Employer, Louisiana-Pacific Corporation, at the Chilco, Idaho, waferwood plant and sawmill in spring 1984 as a knife grinder. He then advanced from welder to mechanical worker to millwright worker. Claimant worked as a shift millwright from April 1986 through the date of his present accident and injury, September 28, 1987. He was earning $10 per hour plus production bonuses.

III.

On September 28, 1987, Claimant experienced a severe crushing injury to his right arm when he was using a press-type device while working for Defendant Louisiana-Pacific. He suffered an acute laceration to his right arm and elbow with severe damage to the radial and ulnar nerves. The radial nerve regenerated

and reinervated after several months. The ulnar nerve did not function. Claimant therefore underwent several nerve grafting surgeries for reconstruction of the ulnar nerve and physical therapy to regain motion in his elbow. About eight months later, on May 2, 1988, Dr. Peter C. Jones, Claimant's treating physician, predicted it would be about a year before sensation would return to Claimant's hand and one to two years before Claimant would stabilize.

IV.

Claimant returned to work on February 20, 1989, about nine months later, in a modified light-duty millwright position. His returning salary was $10.30 an hour plus bonuses. After his return, Claimant underwent yet another surgery on May 16, 1989 and was off work from May 16, 1989 through July 9, 1989. He again returned to the light-duty millwright position. Claimant testified that "then they started putting me back out on the floor around the machinery," which was not at all comfortable because:

> I about had my arm ripped off, and the outside of my arm and hand was numb, and I thought it would be too easy to get it caught again, there was no mobility or coordination in my hand.

Tr., p. 21, ls. 1-4. The plant manager, Steve Warren, later received word that Claimant was "nervous around equipment."

V.

Mr. Warren took steps to meet with Claimant and Linda Graf, consultant with the Industrial Commission Rehabilitation Division, who previously assisted Claimant with his first return to

work. At the meeting held on August 28, 1989, Mr. Warren identified three positions: warehouse trucker, presser relief and dryer relief, as posssibly being within Claimant's physical abilities. Claimant had been learning to do the latter two positions but neither was available. After medical approval of a job site evaluation of the warehouse trucker position, Claimant began work in that capacity on October 13, 1989 at $8.32 an hour plus bonuses.

VI.

In November 1989, Claimant did not show up for work and did not call in as was required by written company policy. The personnel manager called Claimant to see where he was. He replied he was on his way to work and showed up two and one half hours late. Because he had been previously warned about tardies without calling in, Claimant was terminated. This termination resulted in a finding of misconduct in connection with employment before the Department of Employment which precluded him from collecting unemployment benefits.

VII.

The first issue before the Commission is the extent of Claimant's impairment. In evaluating impairment the following must be considered. I.C. § 72-424 provides:

> **Permanent Impairment Evaluation.** — "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such

> as self-care, communication, normal living postures, ambulation, elevation, traveling, and nonspecialized activities of bodily members.

The factor of pain should be considered and included in the impairment evaluation as it equates to a functional loss. *Urry v. Walker and Fox Masonry Contractors,* 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

Claimant has received two impairment ratings. On March 8, 1989, Dr. Jones, Claimant's treating physician, a Coeur d'Alene plastic surgeon and Diplomate of the American Board of Plastic Surgery and American Board of Surgery, assessed Claimant's upper extremity impairment at 54%, using the AMA Guidelines. Forty-two percent of the upper extremity accounted for a complete lesion of the ulnar nerve above the elbow; 4% accounted for impairment of the right hand due to loss of range of motion (2% for the small finger and 2% for the ring finger). Using the combined values chart of the AMA Guidelines, the combined values of 42% and 4% yielded a total upper extremity impairment of 44%. Dr. Jones then added 10% for impairment due to chronic pain for a total of 54% impairment of Claimant's upper extremity or 32% of the whole person. Claimant's arm and hand suffer from numbness, aching and pain.

VIII.

The purpose of the May 16, 1989 surgery performed after Dr. Jones' impairment evaluation, was to alleviate a developing claw-hand deformity of the ring and small fingers which prevented Claimant from flexing his fingers into his palm, thereby increasing grasping difficulties. On July 13, 1989, Dr. Jones found Claimant's ulnar nerve function still absent even though Claimant's overall hand performance was increased.

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IX.

A Spokane, Washington panel consisting of Dr. Harry Reese, an orthopedic surgeon, and Dr. Patrick Lynch, a neurosurgeon, examined Claimant on September 7, 1989. They found an atrophied right forearm and a mild claw deformity of the fourth and fifth fingers. Abduction and adduction of the fingers was virtually absent. Claimant's ability to extend his fingers was considerably improved. They rated Claimant at 32% amputation value of the right upper extremity at the shoulder (or 19% of the whole person) because they felt Claimant had a 75% loss of the ulnar nerve function. (Total ulnar nerve function is 42%.) They determined Claimant was unable to perform the duties of a light-duty millwright.

X.

The Referee adopts the treating physician's opinion of Claimant's condition after the operation. The ulnar nerve function was still absent even though overall hand performance increased. Therefore, the Referee finds Claimant's impairment of the ulnar nerve remained at 42% of the right upper extremity. However, the Referee finds the 4% for impairment of the right hand due to loss of range of motion has been reduced to 2% due to the last operation. The Referee further finds Claimant suffers from a 10% impairment due to pain, numbness or discomfort. Consequently, the Referee finds Claimant's total impairment is 50% of the upper extremity rather than the original 54%, which is equivalent to 30% impairment of the whole person.

XI.

In addition to the effect of Claimant's injuries on his

employability, the injuries have also affected his ability to engage in daily living activities. He is unable to engage in recreation he used to do, such as work on his car, tying a fishing line and riding a snowmobile or motorcycle. Dr. John J. Callahan, a Coeur d'Alene psychiatrist, testified that after Claimant's accident, Claimant suffered from a post-traumatic stress disorder. Although Dr. Callahan did not evaluate the disorder for impairment or disability purposes, he testified that among other things, Claimant suffered from a sense of futility due to loss of self-esteem and from loss of ability to carry-out his work. He has sleepless nights. Therefore, after considering that Claimant's efficiency in his activities of daily living has been somewhat reduced and having found Claimant's medical rating is equivalent to 30% of the whole person, the Referee finds Claimant suffers from a total 35% impairment of the whole person.

XII.

The next issue before the Commission is the extent of Claimant's personal permanent partial disability, if any. Defendant Employer has submitted a well-written brief urging the Commission to deny any disability benefits within the meaning of I.C. § 72-403. That section provides:

> 72-403. **Penalty for malingering**—Denial of Compensation.— If a partially disabled employee refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or secured for him, he shall not be entitled to any compensation.

The Referee, however, finds that section 403 does not apply in the context of permanent partial disability benefits. The intent of the

statute is to invoke its penalty only when dealing with a situation where a claimant is able to return to some type of work before he or she has stabilized and refuses and neglects to do so. In such a situation, the claimant has an obligation to engage in suitable work rather than place an unfair burden upon the defendant, surety or employer by requiring payment of total temporary disability benefits when, in fact, Claimant could work. Indeed, Justice Huntley expressed this concept in dicta in his concurrence in *Gomez v. Rangen's . Inc.,* 105 Idaho 337, 340, 670 P . 2d 42 , 45 (1983):

> It would make no sense to rule that a worker forfeits permanent partial disability entitlement . . . because of refusal to work for whatever reason — rather, a reading of the Code as a whole drives the conclusion that the legislature intended I.C. § 72-403 to apply only to temporary total benefits.

An additional reason why section 403 should not apply to permanent disability benefits is that traditionally the assessment of a disability rating involves an appraisal of the injured employee's *present and probable future ability* to engage in gainful activity within a reasonable geographic area. Therefore, consideration must be given not only to the work Claimant was doing when he was fired, but also to the work he could have engaged in with Defendant Louisiana-Pacific and any other suitable work within a reasonable geographic area. Consequently, the Referee finds section 403 does not apply to permanent partial disability benefits.

XIII.

Having found that section 403 does not apply to permanent

disability benefits, the next consideration is the extent of Claimant's disability, if any. There are three pertinent sections of the Idaho Code that deal with assessing permanent disability under workers' compensation law. I.C. § 72-423 states "permanent disability" results "when the actual or presumed ability to engage in gainful activity is reduced or absent because of a permanent impairment and no fundamental or marked change in the future can be reasonably expected." In addition, I.C. § 72-425 states that the "evaluation (rating of) of permanent disability" is "an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors provided in section 72-430, Idaho Code." Lastly, I.C. § 72-430 states that matters to be considered in determining percentages of permanent disabilities include the nature of the physical disablement, the cumulative effect of multiple injuries, the occupation of the employee, his age at the time of the accident causing the injury, and the diminished ability of the afflicted employee to compete in an open labor market within a reasonable geographical area, considering the personal and economic circumstances of the employee.

XIV.

Claimant is still relatively young at 32 years of age. He does not have his GED and has no other formal education. He can no longer work as a millwright. It is also obvious Claimant cannot perform some types of manual work. Claimant, on the other hand, was earning $8.30 an hour plus bonuses as a warehouse trucker which represents a 20% wage loss. Had the presser relief or dryer relief positions for which Claimant was training been available, Claimant would have earned $9.30 per hour plus bonuses which represents a 10% wage loss.

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At the time of hearing, Claimant was employed by JUB Contractors doing pre-wiring for cable television and telephones. He was earning $8.00 an hour and averaged about 25 hours a week. This salary represents a 52% wage decrease. Linda Graf, Industrial Commission Rehabilitation counselor who worked with Claimant, testified that Claimant could work as a welder in a shop and earn $6.00 an hour. Such a salary represents a 42% wage reduction.

XV.

The Referee concludes that Claimant's injuries have decreased his present and future ability to engage in gainful activity, as his physical impairments and pain prevent him from performing his former work as a millwright. In addition, other non-medical factors have also reduced his ability to engage in gainful activity. However, Claimant could perform other jobs within his ability at Louisiana-Pacific and in the open job market. After evaluating the evidence in the record and considering both, medical and non-medical factors, the Referee concludes that Claimant has a 42% permanent partial disability of the whole person, which includes Claimant's permanent partial impairment of 35% of the whole person.,

XVI.

The final issue is whether Claimant is entitled to attorney fees. Because Claimant abandoned this issue in his post-hearing memorandum and because there is no basis in the record for an award of attorney fees, the Referee finds Claimant has not met his burden of showing he is entitled to an award of attorney fees.

Appendix F

CONCLUSIONS OF LAW

I.

As a direct result of Claimant's accident and injury on September 28, 1987, Claimant has suffered a permanent partial impairment of 35%.

II.

After considering all medical and non-medical factors, the Referee concludes Claimant has suffered a permanent partial disability of 42% of the whole person, which includes the permanent partial impairment rating of 35%.

III.

Claimant is not entitled to attorney fees.

The Referee recommends that the Commission enter the following award.

AWARD

IT IS HEREBY ORDERED that Claimant is entitled to permanent partial disability benefits in the amount of 42% of the whole person, which includes permanent partial impairment benefits in the amount of 35% of the whole person, consistent with the foregoing Findings of Fact, Conclusions of Law and order.

DATED and FILED this 14th day of November, 1990.

Appendix F

INDUSTRIAL COMMISSION

s/ Peggy McMahon
Peggy McMahon, Referee

Appendix F

ORDER

The Commission has reviewed the record and the foregoing Findings of Fact, Conclusions or Law and Order and hereby approves and confirms the same, and adopts them as the decision and order of the Commission.

DATED and FILED this 20th day of November, 1990.

INDUSTRIAL COMISSION

s/ Will S. Defenbach
Will S. Defenbach, Chairman

s/ Gerald A. Geddes
Gerald A. Geddes, Member

s/ Logan E. Lanham
Logan E. Lanham, Member

ATTEST–

s/ Dena K. Burke
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Starr Kelso, Esq.
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Coeur d'Alene, ID 83814

APPENDIX G — *BAKER V. LOUISIANA-PACIFIC*, RESPONDENTS BRIEF DATED NOVEMBER 26, 1990

IN THE SUPREME COURT OF THE STATE OF IDAHO

SUPREME COURT DOCKET NO.
19430

RESPONDENT'S BRIEF

BURTON BAKER,

Claimant/Respondent,

vs.

LOUISIANA-PACIFIC CORPORATION,

Defendant/Appellant.

BRIEF OF RESPONDENT

Appeal from the Industrial Commission

State of Idaho

CHAIRMAN, GERALD GEDDES, Presiding

STEVE VERBY
VERBY LAW FIRM
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SANDPOINT, IDAHO 83814

ATTORNEY FOR
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COEUR D'ALENE, IDAHO
83814

ATTORNEY FOR APPELLANT

Appendix G

STATEMENT OF THE CASE

While working for Louisiana-Pacific Corporation, Burton Baker fell approximately 10 to 12 feet in October of 1982 and sustained multiple fractures of both arms. In 1983 he returned to work for Defendant Louisiana-Pacific Corporation. He worked for Louisiana-Pacific Corporation for approximately four months. In June of 1983 employees of Louisiana-Pacific Corporation went on strike. The Claimant refused to cross the picket line. Because he refused to cross the picket line and return to work, his job was terminated.

Burton Baker obtained employment with the U.S. Forest Service at a reduced wage in 1984. Burton Baker's condition gradually became progressively worse because he developed traumatic arthritis in his upper extremities.

After the hearing of October 11, 1990, the Industrial Commission concluded that the Claimant suffered at 9% permanent partial impairment and a 35% permanent partial disability as a result of the 1982 industrial injuries.

STATEMENT OF FACTS

Burton Baker was working for Louisiana-Pacific Corporation on October 21, 1982. Mr. Flory, Burton Baker's supervisor, asked Mr. Baker and another person to hang up some fire hoses in the basement of the mill to dry. (Tr. p. 77, ll. 9-11.) The foreman suggested that the firehoses be as high as Mr. Baker could get them. (Tr. p. 77, ll. 18-19.) While hanging up the hoses, Burton Baker fell approximately 10 to 12 feet to the concrete. He landed face down with his chin, both arms, and his left knee striking the floor.

Appendix G

After the fall he was taken to the hospital. (Tr. p. 78, ll. 15-21.) Burton Baker knew that both arms were broken and was aware that he had multiple fractures. (Tr. p. 78, ll. 24-25, p. 79, ll. 1-2.)

Dr. Hill, Burton Baker's treating physician, indicated that the right wrist had a comminuted fracture of the distal radial shaft extending into the articular surface of the fragment. The left wrist had a nondisplaced fracture into the distal radial metaphysis with a vertical oriented lucency in the lateral aspect. The growth plate in the left wrist had a "step off" which measured three millimeters in the medial portion of the radial metaphysis. A closed reduction of the fracture of the right wrist was required. Both arms were placed in long arm casts. According to Dr. Hill, by 1982 Burton Baker had mild degenerative changes in the left wrist secondary to the fracture. (Claimant's Exhibit No. 3, Letter of Dr. Hill dated May 25, 1990.)

Burton Baker had worked in saw mills approximately 25 years until 1983. (Tr. p. 80, ll. 13-16.) While working for Louisiana-Pacific, Burton Baker became familiar with the jobs available at that lumber mill. He was a straight line edge chipper operator. He also drove carrier for a number of years. (Tr. p. 83, ll. 1322.) Burton Baker also worked as a laborer pulling both "dry chain" and "green chain." "Pulling chain," whether dry or green, means pulling lumber on a continual basis and separating it according to grade and length. (Tr. pp. 84-85.)

Burton Baker completed the twelfth grade in school and obtained a high school diploma. He did not have any specialized vocational training since completing high school. (Tr. p. 86, ll. 1-5.)

After Burton Baker's casts were removed, he wanted to return

to work. Even though he wasn't able to actually do the work, he came back to work early and began practicing by turning boards. (Tr. p. 88, ll. 17-22, p. 148, ll. 16-25.)

On March 1, 1983, Burton Baker returned to work in a full time position. (Tr. p. 79, ll. 24-25, p. 80, l. 1.) Burton Baker's full time work was running the straight line edge chipper. (Tr. p. 80, ll. 5-6.) Burton Baker worked at that job approximately four months. (Tr. p. 81, ll. 3-6.)

Louisiana-Pacific's employees went on strike on June 27, 1983. Burton Baker did not cross the picket line.

Prior to going out on strike, and during his initial return to work, it became obvious to Burton Baker that he was not going to be able to continue working in the saw mill forever. There were motions and lifting which required using the left hand. It was difficult for Burton Baker to utilize his left hand. (Tr. p. 89, ll. 7-14.)

Burton Baker's symptoms have slowly and progressively degenerated. (Tr. p. 87, ll. 1-4.) By December 1, 1987, Burton Baker was experiencing involuntary opening of his left hand. (Record, p. 103, Claimant's Exhibit No. 3.) X-rays revealed "possible mild degenerative joint change and/or incongruity" which resulted from breaking his wrists. (Record, p. 103.) Even though Dr. Hill, Burton Baker's original treating physician stated he saw no "debilitating" impairment as of January 12, 1988, he stated that degenerative changes can slowly progress. (Record, p. 103, Claimant's Exhibit No. 3.) Approximately two and a half years later, on May 25, 1990, Dr. Hill determined Burton Baker had symptomotology compatible with post traumatic osteoarthritis of the left wrist. (Record, p. 103, Claimant's Exhibit No. 3.) Dr. Hill

stated that Burton Baker had chronic pain which limited his activities and resulted in a loss of strength. (Record, p. 103, Claimant's Exhibit No. 3.) It was Dr. Hill's opinion that Burton Baker's condition "would not be expected to improve with time, indeed will more likely increase in severity with time." (See Claimant's Exhibit No. 3.)

Dr. Blaisdell also conducted an evaluation of Burton Baker. Dr. Blaisdell is a board certified orthopedic surgeon who resides in Sandpoint, Idaho. Dr. Blaisdell examined Burton Baker on August 24, 1989. During that visit Burton Baker reported aching in his left wrist about 25% of the time, especially when the weather is cold and damp. In addition, Burton Baker's joints stiffen in bad weather. (Record, p. 103, Claimant's Exhibit No. 1.) Burton Baker cannot drive for long periods of time. His left wrist swells with increased activity. Burton Baker also has a loss of strength. (Record, p. 104, Claimant's Exhibit No. 1.)

Dr. Blaisdell conducted a physical capacities evaluation. It was Dr. Blaisdell's opinion that Burton Baker should not lift or carry anything more than 20 pounds with his left hand. Further, it was Dr. Blaisdell's opinion that Burton Baker should only "occasionally" use his right hand in lifting 21 to 25 pounds. Burton Baker could lift between 11 and 20 pounds "occasionally" with both hands, and could frequently use both hands to lift 6 to 10 pounds. On a continuous basis Burton Baker could use both hands to lift and carry up to five pounds. (Claimant's Exhibit No. 1.)

According to Dr. Blaisdell, Burton Baker could occasionally push and pull with his left hand. Burton Baker's left hand would only be "fair" in engaging in fine manipulation. (Claimant's Exhibit No. 1.)

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Dr. Blaisdell also found that Burton Baker had limitations with regard to exposure to marked changes in temperature and humidity which were characterized as being between mild and moderate. Burton Baker also had mild restrictions of activities involving the use of automotive equipment. (See Claimant's Exhibit No. 1, Records of Dr. Blaisdell, Physical Capacities Evaluation.) Dr. Blaisdell's opinion was that Burton Baker had a 14% permanent partial impairment rating of the whole person. This compared to Dr. Hill's July 26, 1990 opinion that:

> "It has become obvious that he [Burton Baker] is developing degenerative disease secondary to his injuries. This certainly will be permanent and likely slowly progressive. Therefore exact percentage may be altered with the passage of time. I would place his impairment rating at 15%." (See Claimant's Exhibit No. 3, Records of Dr. Hill, July 26, 1990 letter.)

On October 8, 1990, Dr. Goldberg conducted an examination and evaluation of the Claimant. Dr. Goldberg's practice has been confined to family, occupational, and industrial medicine. (See Deposition of Dr. Goldberg, pp. 17-24.) By letter dated October 9, 1990, Dr. Goldberg stated that Burton Baker "sustained a 15% Permanent Partial Impairment of the whole man as the result of the injuries he sustained while working for Louisiana-Pacific and falling." (Claimant's Exhibit No. 8.) During Dr. Goldberg's deposition, defense counsel presented Dr. Goldberg with a job site analysis which was performed by "Owen Consultant Services" for the edgerman position at the Moyie Springs Louisiana-Pacific Mill. (Deposition of Dr. Goldberg, p. 72, ll. 5-11.) This was the job Burton Baker was doing after he returned to work for four months before the strike. It was Dr. Goldberg's opinion that Mr. Baker could no longer perform that type of work. (Deposition of Dr.

Goldberg, p. 72, ll. 19-25, p. 73, ll. 1-12); (See also Deposition of Dr. Goldberg, Exhibit No. 5.)

Louisiana-Pacific sent Burton Baker to see Dr. Stephen Sears in Spokane. The defense physician determined that Claimant had an impairment of 4% of the left upper extremity and 3% of the right upper extremity. No "whole man" impairment evaluation was given. Dr. Sears utilized the AMA Guide. (See Dr. Sears' letter of October 10, 1990, letter of September 13, 1990, Defendant's Exhibit T.) According to Dr. Blaisdell, the Sears' impairment translates to a 4% of the whole man rating according to the AMA Guides. However, the AMA Guides do not take into consideration the factor of pain. (Record, p. 105.)

Almost three and a half years before the hearing, Dr. James Brinkman, a Spokane, Washington, hand surgeon, examined Burton Baker. Dr. Brinkman concluded that Mr. Baker suffered from a chronic low-grade median nerve compression syndrome. At that time he did not believe the Claimant had a "significant disability." At that time no rating was given.

When the Claimant searched for work after he was terminated, he applied for work at the J. D. Lumber Co. in Priest River. He also went to an employment agency in Coeur d'Alene two different times in an attempt to get work. (Record, p. 109.)

Ed Flory, the saw mill manager, testified on behalf of Defendant Louisiana-Pacific Corporation. The mill manager testified that the job as edgerman required the operator to lift up to 100 pounds on an occasional basis. (Tr. p. 144, ll. 11-14.) The job that Burton Baker was doing post-injury continues to remain the same. The same machine is being used. (Tr. p. 143, ll. 1820.) The job involves unjamming lumber. (Tr. p. 144, ll. 15-21.) There are

times when 100 pound boards are lifted and then pushed or pulled in the job as edgerman. (Tr. p. 145, ll. 8-10.) Burton Baker's former job at the Louisiana-Pacific saw mill involved continuous pushing The pushing would require Burton Baker to push 10 to 15 pound boards into feed rollers. (Tr. p. 145, ll. 13-17.) Burton Baker's former job at Louisiana-Pacific saw mill was the type of job which required use of the left hand more than the right hand. (Tr. p. 145, ll. 18-21.) The person doing the job of edgerman is required to grasp boards on a continuous basis. (Tr. p. 147, ll. 7-9.)

Attached to Dr. Goldberg's deposition is the Owen Consultant Services Job Analysis for the Position of Edgerman at the Louisiana-Pacific, Moyie Springs, Idaho, mill. (Deposition of Dr. Goldberg, Exhibit No. 5.) According to the vocational specialist hired by Defendant Louisiana-Pacific Corporation, the job of edgerman requires lifting to waist level 25 pounds occasionally and 100 pounds rarely. The report states: "The person may only lift boards completely up to unjam lumber; generally the boards are small, but at times large boards from the chipping saw must be lifted in order to unjam the conveyor." According to the vocational report submitted by Louisiana-Pacific Corporation, and included in the Deposition of Dr. Goldberg, the edgerman is required to lift below the waist level 25 pounds occasionally and 100 pounds rarely. (See Deposition of Dr. Goldberg, Exhibit No. 5.) The edgerman job requires the individual to carry between 25 to 75 pounds on an occasional basis. The Owen Consultant Services report states:

> "When unjamming lumber, a person may need to carry some boards a very short distance; the 100-pounds board may lifted and pushed-pulled one and (sic) at the time."

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According to Louisiana-Pacific Corporation's vocational consultant's report, the 2X8 foot boards are 25 pounds while the chipping boards are 100 pounds. The person pushes (and pulls) the smaller boards continuously in order to assure the board moves on the conveyor correctly and is in position for sawing. The jammed larger boards from the chipping saw may occasionally need to be pushed and pulled into place. Pushing and pulling is continuously required. (See Owen Consultant Services Report, Exhibit No. 5 to Deposition of Dr. Goldberg.)

The Industrial Commission determined that Burton Baker could not return to his former position as edgerman. (Record, p. 108.)

The Industrial Commission determined that Burton Baker could not return to any saw mill work which involved continuous pushing and pulling — "virtually every job in the saw mill." (Record, p. 108.)

Steven Hamman, a vocational specialist, testified. Steve Hamman has an extensive background in vocational rehabilitation. He is also a vocational expert for the Social Security Administration. He is called by the Social Security Administration during hearings to determine the employability of claimants in the Social Security system. (Deposition of Steve Hamman, p. 6, 11. 1420, Deposition Exhibit No. 1.) Between April 17 and October 11, 1990, Steve Hamman conducted a disability evaluation of Burton Baker. (Deposition of Steve Hamman, p. 8, 11. 20-25, p. 9, 11. 12.)

Mr. Hamman testified that Burton Baker sustained a loss of about one-half of the labor market he had previously accessed because of his injuries sustained while working for Louisiana-

Pacific Corporation. (Deposition of Steve Hamman, p. 11, 11. 14-18.) Based upon his analysis, Steve Hamman testified that Burton Baker sustained a yearly loss of wages in the approximate amount of 50%. This loss compared the United States Forest Service employment to his wage at the time of injury. (Deposition of Steve Hamman, p. 12, ll. 1-8.)

The Industrial Commission determined that Burton Baker had access to the medium, light, and sedentary jobs in the labor market before his injury. (Record, p. 109-110.) After his injury, Burton Baker had no transferable job skills and had access only to the light and sedentary jobs. Thus, half of Burton Baker's job loss was the result of Burton Baker's inability to perform jobs which required medium levels of activity. (Record, p. 110.)

The Industrial Commission concluded that Burton Baker sustained a 26% wage reduction on an hourly basis. (Record, p. 110.) However, while Burton Baker was able to work year round at the job with Louisiana-Pacific, his forest service job will typically last eight months. During the winter months there is no forest service job. (See Exhibit No. 1 to Deposition of Steve Hamman.) While Burton Baker worked for Louisiana-Pacific he received retirement and health benefits. While working for the forest service he does not receive those same benefits. (See Exhibit No. 2, p. 5, Deposition of Steve Hamman.)

The Industrial Commission concluded that if Burton Baker was forced to find another job at this time, it is likely to be more in the minimum wage range of $4.25 per hour or, about a 60% wage loss. (Record, p. 110.)

The Industrial Commission determined that Burton Baker's permanent partial disability rating was 35% of the whole man. (Record, p. 118.)

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ADDITIONAL ISSUES PRESENTED ON APPEAL

Is Burton Baker entitled to attorney-s fees on appeal?

ARGUMENT

I. ATTORNEYS FEES UPON APPEAL

This Court has consistently held that if the appellate court is left with an abiding belief that an appeal was brought, pursued, or defended frivolously, unreasonably, or without foundation, attorneys fees should be awarded to the Respondent. *East Shoshone Hosp. Dist. v. Nonini,* 109 Idaho 937, 712 P.2d 638, (1985), *Minich v. Gem State Developers, Inc.,* 99 Idaho 911, 591 P.2d 1078 (1979), and *Ashby v. W. Council, Lumber Production,* 117 Idaho 684, 791 P.2d 434 (1990).

In addition, this Court has held that attorney fees should be awarded if the appeal ". . . does no more than simply invite the appellate court to second-guess the trial court upon conflicting evidence, or if the law is well settled and the appellant has made no substantial showing that the District Court misapplied the law." *Johnson v. Edwards,* 113 Idaho 660, at 662 747 P.2d 69 (1987). *(See also: Davis v. Gage,* 109 Idaho 1029, 712 P.2d 730 (App. 1985).

The Idaho Court of Appeals, in *T-Craft Aero Club, Inc. v. Blough,* 102 Idaho 833, 642 P.2d 70 (App. 1982), applied this Court's prior ruling in *Minich, Supra.* The appellate court then found that the appellant in *Blough* was ". . . unable to do more than dispute minor details and point to conflicts in the evidence." *Blough, Supra,* 102 Idaho at 837. The Idaho Court of Appeals then stated:

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> ". . . As noted above, when a trial court's findings are supported by substantial and competent evidence, the mere existence of other, conflicting evidence does not establish that the findings are clearly erroneous.
>
> These principles are well known to Idaho practitioners. They mark the fundamental difference between a trial court and an appellate court. An appeal should do more than simply invite the appellate court to second-guess the trial court on conflicting evidence. Absent a clear showing of error, we will not invade the trial court's domain.
>
> We are left with the abiding belief that the appeal in this case was brought without foundation. Accordingly, we hold that the Club is entitled to award of a reasonable attorney's fee on appeal, to be determined under I.A.R. 41."

(*Blough, Supra,* 102 Idaho at 837.)

In the present case, the Industrial Commission has expressly stated its findings regarding the existence and amounts of impairment and disability suffered by Burton Baker. With the exception of the opinion of one physician who saw Burton Baker three and one-half years before the hearing, the physicians' opinions presented at the hearing, including those of both the appellant and respondent, indicated that the respondent incurred a permanent partial impairment. There was no vocational evidence presented by Defendant Louisiana-Pacific Corporation

demonstrating Mr. Baker had not sustained disability. The appellant's position in this matter, as viewed in its most favorable light, does no more than dispute minor details and point to minor conflicts in the evidence. As the Court of Appeals held in *Blough, Supra,* the mere existence of other, conflicting evidence does not establish that the findings by the lower tribunal are clearly erroneous. *The appellant in this case has, as in Blough Supra does no more than invite the appellate court to second-guess the lower tribunal on conflicting evidence.*

Accordingly, the respondent contends that this Court, after its examination of the transcript, record, and briefs submitted in this matter, will be left with an abiding belief that this appeal was brought and pursued either frivolously, or unreasonably, or without foundation. Pursuant to the authorities cited above, Burton Baker should be awarded attorney fees and costs in responding to this appeal.

II. THE INDUSTRIAL COMMISSION RELIED ON SUBSTANTIAL COMPETENT EVIDENCE IN DETERMINING CLAIMANT'S PERMANENT PARTIAL IMPAIRMENT.

Defendant Louisiana-Pacific's allegation in this appeal that the Industrial Commission did not rely on substantial competent evidence in arriving at its determination of permanent partial impairment is ridiculous.

Five physicians' opinions were admitted in evidence without objection. Four physicians stated that Burton Baker sustained a physical impairment as a result of the multiple fractures in both arms. Without exception, all doctors who have seen, treated, or evaluated Burton Baker within the last two years before the

hearing date concluded that Burton Baker sustained permanent impairment. Dr. Blaisdell, in his report stated:

> "IMPAIRMENT RATING
>
> Based on Idaho Code 72-422 and 72-424 and being aware of a recent judicial ruling relative to pain; and with the benefit of over 45 years of experience in the field of orthopaedics; and with the aid of the AMA Guide, I concluded that this patient's impairment amounts to 14% of the whole person."

(Claimant's Exhibit No. 1, letter of Dr. Blaisdell dated August 25, 1989, p. 6.)

The treating physician, Dr. Hill, wrote a letter to Louisiana-Pacific Corporation on July 26, 1990. Dr. Hill's letter to Louisiana-Pacific Corporation was addressed to Patricia Turner. It stated in pertinent part:

> "Dear Ms. Turner:
>
> In response to your request for further information on Mr. Burton Baker, as of Mr. Baker's most recent examination clinical and x-ray, it has become obvious that he is developing degenerative disease secondary to his injuries. This certainly will be permanent and likely slowly progressive. Therefore exact percentage may be altered with the passage of time. I would place his impairment rating at 15%."

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(See medical records of Dr. Hill, Claimant's Exhibit No. 3, Deposition of Dr. Hill.)

It is anticipated that Louisiana-Pacific will attempt to discredit Dr. Hill's opinion because he changed his mind from his earlier position. Dr. Hill did not originally anticipate any impairment. Obviously, Dr. Hill changed his opinion as time went on.

Dr. Hill, as would any reasonable physician, relied on more recent x-ray findings, and a later evaluation by a respected orthopedic specialist before changing his opinion. As Dr. Hill testified:

> "A Do you have confidence in Dr. Blaisdell's abilities in terms of conducting an impairment evaluation?
>
> A Yes. Especially orthopedic.
>
> Q And that is based upon what?
>
> A Well, I have worked with Dr. Blaisdell for a few years before he retired in one end of this business, and he's a good orthopedist.
>
> Q Do you feel he knows what he's doing?
>
> A Yes.

(Deposition of Dr. Hill, p. 33, ll. 18-25, p. 34, ll. 1-2.)

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Dr. Hill again reiterated at the time of his deposition his impairment evaluation based upon Idaho Code § 72-424:

> "Q In arriving at your impairment evaluation of 15%, did you believe at that time that that was prepared that that was a true and correct evaluation?
>
> A Yes.

(Deposition of Dr. Hill, p. 35, ll. 11-15.)

> "Q Do you feel that — that Mr. Baker has developed traumatic arthritis as a result of the at-work injury when he broke both wrists?
>
> A Yes."

(Deposition of Dr. Hill, p. 36, ll. 1-6.)

As early as 1987, (report of January 12, 1988) Dr. Hill recognized the possibility of the development of traumatic arthritis by Burton Baker. He stated in his January 12, 1988 letter, in pertinent part:

> "The left wrist revealed possible mild degenerative joint change and/or incongruity which would definitely be secondary to his fracture.
>
> As noted on my office notes, I cannot explain the involuntary opening of his left hand on the basis of physical findings, x-rays and it is

> certainly not compatible with any peripheral nerve problem. I believe that Burton Baker has minimal degenerative changes in the left wrist secondary to his fracture and *I am sure that you are aware degenerative changes can slowly progress.* (Emphasis supplied.)

(See medical records of Dr. Hill, Claimant's Exhibit No. 3.)

After Dr. Hill reviewed an x-ray report prepared by of Dr. Blaisdell, Dr. Blaisdell's narrative report, and, after having seen Burton Baker with regard to a back injury on more than one occasion, Louisiana Pacific Corporation chose to ignore Dr. Hill's findings. In Dr. Hill's May 25, 1990 letter, page 2 (see Claimant's Exhibit No. 3), Dr. Hill stated:

> "These findings in conjunction with the patient's x-ray findings and the patient's symptomatology are compatible with post traumatic osteoarthritis of the left wrist with chronic pain and activity limiting discomfort and loss of strength. This would not be expected to improve with time. *Indeed will more likely increase with severity in time.* (Emphasis supplied.)

After reviewing the information described above, Dr. Hill determined that Burton Baker had a 15% permanent partial impairment.

Dr. Blaisdell explained the process of degenerative arthritis during the course of his deposition.

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"Q Doctor, what do you mean by 'arthritic changes'?

A The normal joint surface is smooth and exceedingly slippery and is lubricated by joint fluid formed by a membrane which lines the joint. And it's six times as slippery as rubbing two ice cubes together. Why, if anything upsets that benign combination of items, the patient may begin to show signs of arthritis.

At first there may be nothing in the X ray to believe this condition, but it may be manifested by pain with motion, swelling, possibly increased local temperature, and reddening.

At a later stage changes may make their appearance on the X ray such as narrowing of the joint space between two bones which move upon one another and the appearance of spurs growing out from the margins of the cartilage which covers the end of the bone and the development of hard bone underneath the cartilage cap, which is sometimes called reactive bone. And cysts, or empty spaces, in the bone may make their appearance in later stages.

This — these comments I'm making are made with specific reference to the type of arthritis we see with isolated injury or hard usage on a repetitious basis. There are other kinds of arthritis, of course, but I suspect this is what

you wish me to talk about. This is what we sometimes call post traumatic arthritis. It can only go one way. With the passage of time, it will worsen simply because the articular cartilage has virtually no powers of repair. Once it's been damaged, it tends to get worse rather than better.

Q In your opinion, does Mr. Baker have post traumatic arthritis relative to breaking both forearms in the industrial accident?

A Yes, sir, he does in both wrist joints.

Q And was that demonstrated in the X rays that you reviewed?

A The two things that we see in both wrists is narrowing of the joint space, which is due to partial loss of the joint cartilage, which normally is pretty close to an eighth of an inch thick. And the other thing that is noticeable is the appearance of reactive bone in the distal radius occurring underneath the damaged articular cartilage.

Cyst formation is also seen in the right radius, but this is more at the fracture site than at the wrist joint. So I cannot say that the cyst formation is the result of what's going on in the wrist joint but rather something that's confined to the fracture site."

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(Deposition of Dr. Blaisdell, p. 67, 11. 10-25, p. 68, p. 69, 11. 1-18.)

> Dr. Goldberg testified:
>
> ". . . There is a — there's a decrease in range of motion of both of his wrists. This is indicative of having had trauma at sometime in the past. As we've indicated, he had fractures of both of his forearms. He had casting of both of his forearms. Apparently he has residuals which includes arthritis of the wrists, which includes some, as I recall, malalignment of the joint—
>
> Q Is your opinion then based upon — to a medical probability, that Mr. Baker suffers post traumatic arthritis of the wrist as a result of the October, 1982, accident?
>
> A That's my opinion at this time, yes."

(Deposition of Dr. Goldberg, p. 52, 11. 8-21.)

Dr. Goldberg assessed Burton Baker's impairment at 15% of the whole man. His opinion was based upon 27 years of medical experience, the volume of patients he has seen in the past, the assessment of Burton Baker's individual history, the physical findings that he made, and "to a degree" based upon the AMA Guidelines. (Deposition of Dr. Goldberg, pp. 53-54.)

And while Defendant Louisiana-Pacific Corporation wished to have Mr. Baker's impairment rating based exclusively on the Third Edition AMA Guides, Dr. Goldberg stated:

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> "I am not capable of exclusively using this guide to come up with any percentage impairment on any patient at any time. It is a guide."

(Deposition of Dr. Goldbert, p. 58, 11. 9-12.)

It was Dr. Goldberg's opinion that a person with Burton Baker's physical problems should not be in a position where he is continually pushing and pulling boards, where he would be required to lift 25 pounds occasionally, and where he may be required to lift up to 100 pounds. (Deposition of Dr. Goldberg, pp. 77-78.) Similarly, Dr. Goldberg did not feel that Burton Baker should be placed in a job position where he would be required to unjam lumber if it entails lifting up to a 100 pounds in boards. With regard to a return to work at the lumber mill, it was Dr. Goldberg's opinion that Burton Baker should not return to lumber mill work. This opinion was consistent with the physical capacities estimates of Dr. Blaisdell, which Dr. Hill felt were appropriate. (See Physical Capacities Evaluation of Dr. Blaisdell attached to his report.) Dr. Sears, the physician who saw Mr. Baker at Defendant Louisiana-Pacific's request, offered no opinion on whether or not Burton Baker could return to saw mill work.

Even Dr. Sears concluded that Burton saker had sustained a permanent partial impairment. Dr. Sears, in his report of September 13, 1990, on page 4 stated:

> "X-RAYS: Multiple films are available for both wrists beginning with the time of injury and followed through the time of the initial treatment in 1983. On the left, there is noted to be an interarticular fracture of the distal radius

which is somewhat comminuted and does involve the radial styloid as well as what appears to be several small fractures towards the ulnar half of the joint. On initial films is noted to very slight displacement of the fractures noted. On the right, the patient is noted to have a fracture of the distal radius which is oblique and approximately 2 inches proximal to the distal portion of the radius. Some small nondisplaced longitudinal fractures do go out to involve the distal radial joint. Follow-up x-rays and plaster reveal healing of the fracture of the distal radius in less than anatomic, but satisfactory position. Follow-up x-rays of the wrist taken in March 1987 reveal some healing with remodeling of the distal radial fracture on the right and some interarticular early arthritis between the distal radius and ulna is seen on the right but is felt to be minimal. On the left, it is minimal, but more pronounced. Final x-rays are available for review taken on August 24, 1989. On the right again is noted a fracture of the distal radius which is healed in an anatomic position with fracture of the distal radius which is healed in an anatomic position with slight angulation and offset. Very minimal if any arthritis is seen affecting the joint between the distal radius and the carpal bones. On the left however, there is joint space narrowing noted between the distal radius and the carpal bones. The general shape of the distal radius is felt to be within normal limits however.

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> DIAGNOSIS: Post-fracture of the distal left radius and ulna with considerable interarticular involvement of the fracture of the distal left radius." (See Defendant's Exhibit T.)

Dr. Sears concluded Burton Baker had a 4% impairment of the left upper extremity and 3% of the right upper extremity. (See Defendant's Exhibit T.)

Idaho Code § 72-424 describes what is to be measured in a permanent impairment evaluation:

> "**72-424. Permanent impairment evaluation.** — 'Evaluation (rating) of permanent impairment' is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and nonspecialized activities of bodily members."

Thus, in this case, a permanent impairment evaluation is a "medical appraisal of the nature and extent of the injury . . . as it affects . . ." Burton Baker's "personal efficiency in the activities of daily living . . . ."

Astonishingly, Defendant Louisiana-Pacific Corporation challenges the Industrial Commission's statement that "it is undisputed at this point in time that claimant has an impairment from his industrial accident." Defendant Louisiana-Pacific Corporation alleges, on page 13 of its brief, that "this statement is in error." To anyone who has read the record, Louisiana-Pacific's

statement is, at best, *astounding*, and at worst, an attempt to mislead the Court. Three of the four doctors who examined the Claimant within two years of the date of the hearing concluded that Burton Baker now has traumatic arthritis because of his at-work injuries. *All four physicians including the physician who saw Burton Baker at the request of Defendant Louisiana-Pacific Corporation concluded that Burton Baker sustained a permanent partial impairment.*

To allege in their appeal that there is no substantial competent evidence to support the Industrial Commission's opinion that Burton Baker sustained a 9% permanent partial impairment, when all four of the physicians' records have been admitted without objection, is not only incredible, but is ludicrous! This is especially true in light of the fact that the Defendant, Louisiana-Pacific, presented no evidence to refute the evidence that Burton Baker's present condition was the direct result of his at-work injury of 1982.

Defendant Louisiana-Pacific Corporation, in its initial brief, does not articulate which physician stated that Burton Baker, *at the time of hearing,* did not have a permanent physical impairment. Perhaps Louisiana-Pacific's position is based upon the contention that no physician arrived at exactly a 9% impairment evaluation. Regardless of whether or not a physician articulated a 9% impairment rating, the Industrial Commission can determine impairment. In *Urry v. Walker and Fox Masonry Contractors,* 115 Idaho 750, 769 P.2d 1122 (1989) this Court stated:

> "Of course the physician's opinion is advisory to the Industrial Commission which, as the ultimate fact-finder, will determine the extent of impairment based on all the evidence of pain and other pertinent factors."

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(115 Idaho at 755.)

In the *Urry* case, the Idaho Supreme Court concluded:

> "We recognize, of course, that a finding on the question of impairment must be upheld when supported by substantial evidence. Idaho Code § 72-732(1)."

(115 Idaho at 754.)

> Idaho Code § 72-732 states in pertinent part:
>
> "72-732. Disposition of appeal — Jurisdiction of Supreme Court. — Upon hearing the court may affirm or set aside such order or award, or may set it aside only upon any of the following grounds:
>
> (1) The commission's findings of fact are not based on any substantial competent evidence;"

With respect to the issue of impairment, the Industrial Commission stated:

> "It is undisputed Claimant suffers a minimum of 4% of the whole person based on the right and left arm injuries. The Referee also adds 5% for pain and 'lifestyle' losses. Claimant has worked actively to reduce pain and to increase flexibility. Moreover, from all reports, he is not a complainer. Claimant has worked actively to be able to return to his old job even before he

> was released to full-time work. He lifts weights, performs outdoor activities, and soaks his arms when in pain instead of taking medication. Nevertheless his activities of daily living have been diminished. In reviewing the evidence as a whole, the Referee therefore finds that Claimant suffers from a 9% impairment of the whole person."

(Record, p. 106.)

It is reasonable to conclude that an individual who falls approximately 10 to 12 feet and who sustains multiple fractures of both his right arm and his left arm may develop traumatic arthritis. Further, it is reasonable to conclude from the evidence presented at the hearing that Burton Baker sustained an impairment associated with the at-work injury and the traumatic arthritis.

Defendant Louisiana-Pacific's appeal on this issue is a reargument of the facts already determined by the Industrial Commission. The issue of impairment raised on this appeal is frivolous and without foundation.

III. IS BURTON BAKER PRECLUDED FROM OBTAINING BENEFITS FOR PERMANENT PARTIAL DISABILITY BECAUSE HE REFUSED TO CROSS A PICKET LINE DURING A STRIKE IN 1983?

Defendant Louisiana-Pacific Corporation wants the Idaho Supreme Court to rule that when an individual participates in a strike eight years ago and, as a result of that participation his job is eliminated, the injured working person is not entitled to receive compensation for permanent partial disability. Implicit in

Louisiana-Pacific's argument is the contention that once an individual loses his job because of strike participation, he or she is precluded from ever obtaining permanent partial disability benefits even if *the injured employee's condition deteriorates.* Also implicit in Louisiana-Pacific's argument is the contention that Burton Baker is presently capable of doing the physical work he previously was able to do while he was employed at Louisiana-Pacific Corporation.

Obviously, this Court can conclude that an injured working person can never be entitled to receive partial disability benefits once that injured working person ceases his employment with his or her employer. However, this philosophy should not be the public policy of this State.

If this Supreme Court rules that an employee is never entitled to permanent partial disability benefits if he or she refuses to cross a picket line, it is a short step to deny an injured working person permanent partial disability benefits if the person is fired for misconduct. This type of policy would encourage employers to terminate employees based upon the "fault" or "misconduct" of the employee in order to avoid potential liability for disability in excess of impairment.

Keeping in mind that the concept of a permanent disability evaluation does not simply measure lost wages, but is meant to be an appraisal of the injured employee's ". . . present and probable future ability to engage in gainful activity . . .", (I.C. § 72-425) it is not sound policy to conclude that the employee's disability should be "fixed" at the time he or she returns to work.

In this case Defendant Louisiana-Pacific relies on Idaho Code § 72-403 as the basis for its conclusion that Burton Baker is not

entitled to receive permanent partial disability benefits. Idaho Code § 72-403 states:

> "**72-403. Penalty for malingering** — Denial of compensation. — If a partially disabled employee refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or secured for him, he shall not be entitled to any compensation."

Defendant Louisiana-Pacific's argument is specious when one looks at the purpose of the statute — to prevent malingering. The Defendant's position appears even more unreasonable when the underlying rationale is scrutinized. Louisiana-Pacific Corporation contends that (1) Burton Baker had the physical ability to return to work at Louisiana-Pacific Corporation after his injury and therefore he is still able to do the job; (2) Burton Baker refused suitable work when he refused to cross the picket line; (3) The refusal to cross the picket line eight years ago precludes Burton Baker from receiving permanent partial disability benefits; (4) The time for fixing the "permanent partial disability" was at the time Burton Baker returned to work with Louisiana-Pacific in 1983; and (5) Thus, there is no compensation owed and no disability because of injury.

The foundation of this argument, (even assuming that Idaho Code § 72-403 might apply) is based upon erroneous facts. For example, Louisiana-Pacific states "*The facts are uncontroverted that Claimant fully recovered from his industrial accident . . . .*" (Appellant's Brief, p. 23.) However, as can be seen from the reports of the physicians and their testimony, it is uncontroverted that Burton Baker did *not* fully recover from his industrial injuries.

conclusion that Burton Baker could presently return to saw mill work as of the date of the hearing and do the job of edgerman. This contention is contradicted by the factual finding of the Industrial Commission that the medical evidence in the case was "uncontradicted that Claimant's impairment prevents him from returning to saw mill work of any kind." (Clerk's Record, p. 114.)

A careful review of the record demonstrates that Defendant Louisiana-Pacific Corporation presented no testimony or evidence from any physician or vocational consultant that Burton Baker was capable of doing saw mill work as of the time of the hearing.

Even though Louisiana-Pacific hired a vocational consultant, and even though the vocational consultant's report was utilized in the Deposition of Dr. Goldberg, Defendant Louisiana-Pacific Corporation failed to present any testimony by its vocational specialist with regard to the types of work Burton Baker could do at the Moyie Springs saw mill at the time of hearing. Contrast this absolute lack of testimony with the testimony provided concerning Burton Baker's physical limitations, and the determination that Mr. Baker could not do the job of edgerman at Defendant Louisiana-Pacific Corporation's Moyie Springs mill.

Counsel for Claimant would agree that if Burton Baker had requested payment of total temporary disability benefits during the period he was on strike, Idaho Code § 72-403 may have applied so as to preclude benefits. At the time the strike was initiated in 1983, the Claimant was engaging in saw mill work. However, whether or not the Claimant was doing saw mill work in 1983 is not the issue in this case. The reason it is not the issue is because the Claimant is not seeking total temporary disability benefits for the time he was out of work during the strike. Idaho Code § 72-403 does not apply to the facts in this case.

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Justice Huntley agreed with the reasoning that Idaho Code § 72403 does not apply to permanent partial disability benefits in his concurrence in *Gomez v. Rangen's, Inc.*, 105 Idaho 337, 670 P.2d 42 (1983). The Industrial Commission, in the decision in Burton Baker's case, quoted *Gomez v. Rangen's, Inc.:*

> " 'It would make no sense to rule that a worker forfeits permanent partial disability entitlement . . . because of refusal to work for whatever reason — rather, a reading of the code as a whole drives the conclusion that the legislature intended I.C. § 72-403 to apply only to temporary total benefits.' "

(105 Idaho at 340, 670 P.2d at 45, See Record. p. 113.)

The Industrial Commission, in Burton Baker's case stated:

> "An additional reason why § 72-403 should not apply to permanent disability benefits is that traditionally the assessment of a disability rating involves an appraisal of the injured employee's *present and probable future ability* to engage in gainful activity within a reasonable geographic area. Therefore, consideration must be given not only to the work Claimant was doing when he was fired, but also the work he could have engaged in with Defendant Louisiana-Pacific and any other suitable work within a reasonable geographic area."

(Emphasis in original, Record, p. 113.)

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The code section that Defendant Louisiana-Pacific Corporation relies upon, § 72-403, applies to "Malingering." No physician or vocational specialist contends that Mr. Baker is or was a "malingerer" or "shirker" so as to preclude benefits.

Professor Larson, in his treatise, *The Law of Workman's Compensation*, Section 57.63 states:

> "Other things being equal, men with partial disabilities will ordinarily be the last hired and the first fired. In boom or war periods they may get steady employment. In severe depressions they almost certainly will not."

Professor Larson cites the case of *Schnatzmeyer v. Industrial Commission*, 77 Arizona 266, 270 P.2d 794, 797 (1954), for the proposition that the correct rule is ". . . that in determining percentage of disability it is the Commission's duty to consider whether and to what extent [claimant's] disabilities prevented employment." (*Larson*, Section 57.63.)

In this case, this Court should adopt the rationale in *Marsolek v. George A. Hormel Co.*, 438 N.W.2d 922 (Minn. 1989). In the *Marsolek* case, the claimant worked for the Hormel meat packing plant from 1968 until 1985. In 1981 the claimant suffered a number of work injuries for which he received compensation. In January of 1984 he began working in a lighter duty job. In August of 1985 the union went on strike against Hormel. As in the *Baker* case, Marsolek refused to cross the picket line and stopped working. In September of 1985 Marsolek began looking for another job. While on strike, and while the claimant was on the picket line, he threatened to damage cars and injure employees who tried to cross the picket line. Because of this misconduct, Hormel terminated

Marsolek's employment and he was never recalled to work at Hormel. The claimant was unemployed except for a three month period from April, 1987 until July, 1987.

In the *Marsolek* case, the primary issue was whether a discharge for misconduct effects the payment of workers' compensation benefits. In Minnesota, an employer is typically liable for compensation benefits when a claimant suffers a wage loss because of a work-related injury. (*Larson*, Section 57.64(a), Supp., p. 92.) The compensation judge found that the claimant suffered from a permanent partial disability and that the claimant began a diligent work search beginning in September of 1985. The Supreme Court of Minnesota held that:

> ". . . A justifiable discharge for misconduct suspends an injured employee's right to wage loss benefits; but the suspension of entitlement to wage loss benefits will be lifted once it has become demonstrable that the employee's work-related disability is the cause of the employee's inability to find or hold new employment."

(*Marsolek*, 438 N.W.2d at 924.)

In dealing with a similar issue presented in the Burton Baker case, the Minnesota Supreme Court in *Fielding v. George A. Hormel Co.*, 439 N.W.2d 12 (Minn. 1989) addressed the issue of a work-related injury and subsequent strike. The claimant suffered a work-related injury in 1980 for which worker's compensation benefits were paid. In 1981, the employee returned to work and worked in a light duty capacity for four years without wage loss. Once a strike was called, the claimant stopped working. The Minnesota Supreme Court held:

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> ". . . If an injured employee voluntarily goes out on strike, this provides grounds for the suspension of benefits; but the suspension of benefits will be lifted once it has become demonstrable that the disability due to the work injury is the cause of the employee's inability to find work elsewhere."

(*Fielding*, 439 N.W.2d at 15.)

The holding in the *Fielding* case should be applied in this case. Once the Claimant demonstrates that his inability to perform work at Louisiana-Pacific Corporation's mill is due to the disability resulting from the work injury, the employer should not be allowed to state that the cause of the employee's disability is his or her refusal to return to work. The Industrial Commission followed the Minnesota Supreme Court rationale in this case involving Burton Baker:

> "The Minnesota Supreme Court opinion in *Marsolek* therefore stands for the proposition that disability benefits will be awarded when the lost earning capacity is due not to employee misconduct, but from permanent impairment resulting from the industrial accident. The proposition is applicable in the present case where the medical evidence is uncontradicted that Claimant's impairment prevents him from returning to saw mill work of any kind." (Record, p. 114.)

Even if Burton Baker had the physical capability to do his old job, that of edgerman, this Court should not adopt the position that

an injured claimant becomes a "captive" of the employer. As Professor Larson stated in dealing with similar circumstances:

> "One difficulty with the rule in the *Pearl* case is that the claimant, having resumed his employment, apparently must cling to the same job forever, for if he leaves it, even an admitted combination of medical disability and inability to get work as a result will never again entitle claimant to an award."

(*Larson*, Section 57.64(c).)

Larson also states:

> "The receipt of equal wages for lighter work might temporarily prevent the showing of wage loss necessary to support a claim of disability, but if for any reason whatever the receipt of those equal wages is terminated, claimant should be able to show that he is in fact partially disabled, that he has never resumed his regular duties, and that his present earning capacity is therefore reduced. For example, in *Hermon v. Pugh*, [272 App. Div. 985, 72 N.Y.S. 2d 834 (1947)] the employer gave a crippled worker a job at his old wage; but when claimant was thrown out of work by a strike and could not get work elsewhere an award for partial disability was upheld."

(*Larson*, Section 57.64(c).)

Similarly, in this case, Burton Baker's inability to do saw mill work is not because he "quit" work as a result of the strike, but because of his disability. The Industrial Commission's award should be affirmed.

IV. THE INDUSTRIAL COMMISSION'S DETERMINATION THAT CLAIMANT SUFFERED DISABILITY IN EXCESS OF IMPAIRMENT IS SUPPORTED BY SUBSTANTIAL AND COMPETENT EVIDENCE.

Claimant's counsel contends that this Court should fashion a rule, similar to the rule in total permanent disability cases, that once an employee establishes a prima facie case that he is incapable of returning to his prior employment (as in this case), the burden of proof should then shift to the employer to show that there is suitable employment consistent with the Claimant's physical capacities which would preclude a loss of income potential. In other words, once the injured employee demonstrates he can no longer do the employer's work, it is the burden of the surety/employer to demonstrate that there has been no loss of "future ability to engage in gainful activity." (See Idaho Code § 72-425.)

Idaho Code § 72-425 states:

> "**72-425. Permanent disability evaluation.**— 'Evaluation (rating) of permanent disability' is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors provided in section 72-430, Idaho Code."

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Idaho Code § 72-430 states in pertinent part:

"**72-430. Permanent Disability** — Determination of — Percentages — Schedule. — (1) Matters to be considered. In determining percentages of permanent disabilities, account shall be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the afflicted employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the commission may deem relevant, provided that when a scheduled or unscheduled income benefits is paid or payable for the permanent partial or total loss of use of a member or organ of the body no additional benefit shall be payable for disfigurement.

Idaho Code § 72-423 states:

"**Permanent disability.** — 'Permanent disability' or 'under a permanent disability' results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no

> fundamental or marked change in the future can be reasonably expected."

In Idaho, injured workers are paid either based upon "an impairment evaluation" or based upon a "disability evaluation." As previously discussed, an impairment evaluation is a medical appraisal that measures the effect of the injury on the injured employee's activities of daily living. Payment for permanent partial disability is based upon the reduction in the individual's present and probable future ability to engage in gainful activity. As stated in *Seese v. Ideal of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1985) the Court outlined the test for determining permanent partial disability:

> ". . . The test for such determination is not whether the claimant is able to work at some employment, but rather whether the physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant's capacity for gainful activity. *Id.* In that determination, I.C. § 72-425 requires the Commission to take into consideration nonmedical factors such as age, sex, education, and economic and social environment."

(*Seese*, 110 Idaho at 34.)

In making the determination of permanent partial disability, the Industrial Commission can compare pre-injury wages with post-injury wages:

> ". . . We further note that although not utilized by the Commission, a mathematical

> comparison of pre and post-injury wages is evidence of an injured worker's ability to engage in gainful activity. *Baldner v. Bennett's, Inc.*, 103 Idaho 458, 649 P.2d 1214 (1982). Such a mathematical comparison is not in and of itself sufficient to satisfy the strictures of I.C. § 72-425."

(Id.)

In this case, the Industrial Commission did indeed compare preinjury wages with post-injury wages.

> "Claimant was 51 years old at the time of hearing in 1990. He has a high school education but no transferable skills or other training. Any work he obtains would probably be in the minimum wage range. He was earning $10.49 an hour at the sawmill. Claimant said his annual salary would have been about $19,000 in 1982, the year of his injury. He presently earns $7.81 an hour for the Forest Service, which represents a 26% wage reduction on an hourly basis. Claimant earned $13,811.00 in 1989 from the Forest Service or a 27% wage reduction on an annualized basis. His work with the Forest Service is only temporary and he is not guaranteed a job every year. He does not work a full 12 months."

(Record, pp. 110-lll.)

And while Defendant Louisiana-Pacific Corporation would

prefer to focus on bits and pieces of the record such as Dictionary of Occupational Title Listings, it chooses to ignore the substantial competent evidence which the Industrial Commission relied on to make its determination. For example, the Industrial Commission found as facts the following:

> "Consequently, left for consideration is the issue of the extent of Claimant's disability, if any, beyond that of impairment. In 1984 Claimant began working for the United States Forest Service in the Silviculture Department in the Bonners Ferry Ranger District in the stand crew. Despite the fact that it appears he is a firefighter from his civil service health examination, Claimant's job duties involved hiking in the woods, doing habitat typing, taking growth measurements with an increment borer, and reporting the results. He has worked on a full-time temporary basis annually ever since. His present duties include collecting pine cones and preparing trees for planting. All crew members are expected to plant trees and fight fires, but Claimant's job has been modified so that he does not have to perform those duties. Whenever there is a fire, he acts as a "single resource" ordering and distributing supplies. Nan Berger, his immediate supervisor, testified Claimant's movements at work have stiffened over the years. He has not used the pulaski, a fire fighting tool, since 1986. He does not use a chain saw. The Referee finds that Claimant cannot engage in activity which involves

> strenuous work and repetitive pushing and pulling."

(Record, p. 107-108.)

Not only has Defendant Louisiana-Pacific Corporation's outline of the facts been extremely selective but, Defendant Louisiana-Pacific Corporation chooses to ignore the thrust of Steve Hamman's testimony. As stated by the Industrial Commission:

> "Steven R. Hamman, vocational specialist, testified on behalf of Claimant. Mr. Hamman evaluated Claimant on April 17, 1990 and on October 11, 1990. The evaluation time period was from January 12, 1988 to November 5, 1990, the date of hearing. Based on the functional capacities evaluation of Dr. Blaisdell confirmed by Dr. Hill, Mr. Hamman was of the opinion that Claimant sustained a loss of about three-quarters of the total labor market and about one-half of the labor market he previously accessed or probably could have accessed. He explained that one-third of the labor market involves very heavy and heavy work (lift and carry up to 100 pounds). About one-third of the market falls in the medium (up to 50 pounds lift/carry) physical demand category. The remaining one-third is composed of light (maximum lift/carry 20 pounds) and sedentary (maximum lift/carry 10 pounds) physical demand levels. Before his injury Claimant had access to medium, light and

> sedentary jobs in the labor market. After his injury, Claimant had no transferable job skills and access only to light and sedentary jobs. Half of the job loss therefore was due to his inability to perform medium levels of work activity. The Referee accepts this testimony."

(Emphasis supplied. Record, p. 109-110.)

Putting it bluntly, Defendant Louisiana-Pacific Corporation wishes to reargue facts relating to the issue of disability in this appeal. In rearguing the facts before the Supreme Court, it chooses to ignore the evidence submitted and accepted by the Industrial Commission which supports the Industrial Commission's Determination. It is the Defendant's position both on appeal and that at the Commission level the Claimant did not sustain *any* impairment. Also, Defendant Louisiana-Pacific Corporation contends that disability does not exist because Burton Baker has no physical limitations of any kind which preclude him from working at a saw mill. Therefore, according to the Defendant, the only reason Mr. Baker isn't working at a higher paying saw mill position is because he chooses not to work at a saw mill. Defendant Louisiana-Pacific Corporation's argument ignores the facts provided by the physicians with regard to limitation of function and also ignores the testimony of Steve Hamman, which the Commission accepted.

In this case Defendant Louisiana-Pacific Corporation does not assert that facts were presented at hearing which demonstrated that Burton Baker is capable of returning to saw mill work at this time. Similarly, Defendant Louisiana-Pacific Corporation does not assert that facts were presented at the time of hearing which conclusively showed Mr. Baker was capable of obtaining

employment commensurate with his preinjury wage. Instead, Louisiana-Pacific Corporation requests that the Idaho Supreme Court substitute its findings of fact for those of the Industrial Commission.

When consideration is given to the difference in wages earned presently as compared to what Mr. Baker was earning before injury, when consideration is given to the fact that Burton Baker is precluded from accessing 50% of the job market that he previously could, when consideration is given to Burton Baker's lack of transferable skills, his age, education, and geographic locale, when consideration is given to the fact that the Forest Service job is not guaranteed every year, and when one realizes that the termination of Mr. Baker's Forest Service job would result in employment at a minimum wage job, a permanent partial impairment of 35% is justified. Thus, the Industrial Commission concluded:

> "Were Claimant forced to find another job at this time, it is likely to be more in the minimum range of $4.25 an hour or about a 60% wage loss. It appears, however, from Claimant's exemplary work record with the Forest Service he will continue in that capacity. It also appears that Claimant's physical condition is not deteriorating that rapidly inasmuch as it has taken eight years for him to reach his present state of arthritic development. Therefore, taking into consideration all medical and nonmedical factors, the Referee finds that Claimant suffers from a disability of thirty-five percent (35%) of the whole person, which includes Claimant's permanent partial impairment of nine percent (9%) of the whole person."

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(Record, 110-111.)

> The standard for review in this type of case is:
>
> "Our standard of review is well established. This Court is authorized to reverse a decision of the Commission only when the decision is unsupported by any substantial competent evidence or is not supportable as a matter of law. ID. CONST. art. 5, § 9; I.C. § 72-732. Appellate review of Commission decisions does not entail a *de novo* determination of fact. *Graham v. Larry Donohoe Logging*, 103 Idaho 824, 654 P.2d 1377 (1982). The weight to be accorded to evidence is within the province of the Commission. *Nelson v. Pumnea*, 106 Idaho 48, 675 P.2d 27 (1984)."

(*Seese*, 110 Idaho at 33.)

The Supreme Court should affirm the Industrial Commission's factual finding that the injured Claimant, Burton Baker, sustained a 35% permanent partial disability.

CONCLUSION

The Industrial Commission's determinations of permanent partial impairment and permanent partial disability are supported by the testimony and evidence presented at the time of hearing. In this appeal Defendant Louisiana-Pacific Corporation requests that this Supreme Court substitute its opinion for that of the Industrial Commission.

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Based upon the reasons set forth in this brief, the decision of the Industrial Commission should be affirmed and the Claimant should be awarded his attorney's fees on appeal.

DATED this 26 day of November, 1991.

s/ Steve Verby
STEVE VERBY
Attorney for Claimant/Respondent

Appendix G

CERTIFICATE OF MAILING

I hereby certify that two true and correct copies of the foregoing were mailed by regular mail, proper postage affixed on this 26th day of November, 1991, to:

Starr Kelso
Attorney at Law
P.O. Box 2127
Coeur d'Alene, ID 83814-1913

s/Steve Verby

APPENDIX H — *BAKER V. LOUISIANA-PACIFIC*, REPLY BRIEF DATED NOVEMBER 26, 1990

BEFORE THE SUPREME COURT

STATE OF IDAHO

SUPREME COURT DOCKET
NUMBER: 19430

REPLY BRIEF OF APPELLANT

BURTON BAKER,

Claimant/Respondent,

v

LOUISIANA-PACIFIC CORPORATION,

Defendant/Appellant.

REPLY BRIEF OF APPELLANT LOUISIANA-PACIFIC

Appeal from the Industrial Commission

State of Idaho

CHAIRMAN GERALD GEDDES, Presiding

STARR KELSO
SIMS, LIESCHE, NEWELL, KELSO, WALLACE & WALLACE, P.A.
COEUR d'ALENE, IDAHO
83814
ATTORNEY FOR APPELLANT

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POST OFFICE BOX 1005
SANDPOINT, IDAHO
ATTORNEY FOR RESPONDENT

Appendix H

RESPONSIVE ARGUMENT

I

PERMANENT PARTIAL IMPAIRMENT

The Industrial Commission did not rely on substantial, competent evidence in determining that Claimant suffered more than a minimal impairment as a result of his 1982 industrial accident.

Defendant challenges the finding of the Industrial Commission that it was "undisputed" that Claimant has an impairment as a result of his industrial accident. (Clerk's Record at 102.) Any impairment that Claimant suffered that can be causally connected to the accident was de minimis and not notable. The evidence does not support a finding that the impairment was caused by Claimant's industrial accident. As admitted by Dr. Blaisdell and Dr. Goldberg, years of repetitive trauma to the wrist which occurred during the *seven years* prior to the hearing when Claimant worked for the United States Forest Service just as easily could have caused Claimant's minimal degree of traumatic arthritis.

Several of the other findings of fact made by the Industrial Commission based upon the evidence are clearly erroneous.

A. *The finding that Dr. Brinkman made no impairment rating is unsupported.*

In a letter dated March 4, 1987, *Claimant's* counsel, in his search for an impairment, requested James F. Brinkman, M.D., a practicing Spokane physician specializing in plastic and reconstructive surgery and surgery of the hand, to determine Claimant's present physical impairment. (*See* Defendant Exhibit

L.) In the letter, Claimant's counsel, through the use of *eight specific requests,* attempted to lead Dr. Brinkman to the inescapable conclusion that Claimant had suffered an impairment. Dr. Brinkman wrote a letter on July 6, 1987 answering all of the requests. (Claimant Exhibit 2.)

In the letter to Dr. Brinkman, counsel asked:

> 4. Is the physical condition of Mr. Baker stabilized at this time? That is, has Mr. Baker achieved maximum medical rehabilitation so that his condition is not expected to either improve or get worse in the future? Mr. Baker is at the time concerned about the development of traumatic arthritis in the future. If Mr. Baker is not stable at this time, could you please describe what additional medical treatment, diagnostic evaluation, or therapy would be required to assist his recovery?
>
> 5. If Mr. Baker's condition is stable at this time, please set forth your opinion as to the permanent physical impairment which has been sustained by Mr. Baker.

(Defendant Exhibit L, March 4, 1987, Letter of Steven Verby.)

Dr. Brinkman personally examined Claimant on March 26, 1987. That was four years and five months after the accident. He summarized his findings in a letter dated July 6, 1987:

> It is my impression that Mr. Burton's fractures have healed satisfactorily, and *that his*

> *condition is stable*, although he has a chronic low grade median nerve compression syndrome. This is based on his clinical symptoms and physical findings although it must be stressed that there's no electrical evidence of this compression at this time . . . . Although the development of post traumatic arthritis is a mathematical possibility, I would give it a very low percentage probability wise in view of the location of the fractures lines, which are remote from the radial carpal or wrist joint spaces and their current normal appearance on x-rays. It is my opinion that he has made a relatively good recovery from his bilateral fractures and *does not have a significant disability* associated with this injury (emphasis added).

(Claimant Exhibit 2, Defendant Exhibit S.) Claimant asserts in his brief that no impairment rating was given by Dr. Brinkman. (Brief of Respondent at 7.) In Finding of Fact IX, the Commission also states in relation to Dr. Brinkman's report that "[n]o rating was given." (Clerk's Record at 106.) Contrary to this finding, Dr. Brinkman, in *direct response* to *Claimant's* request prior to the examination, made an impairment rating and found no "significant disability."

> "Permanent impairment" is defined in Idaho Code § 72-422:
>
> "Permanent impairment" is any anatomic or functional abnormality or loss after maximum medical rehabilitation has been achieved and

> which abnormality or loss, medically, is considered stable or non-progressive at the time of evaluation. Permanent impairment is a basic consideration in the evaluation of permanent disability, and is a contributing factor to, but not necessarily an indication of, the entire extent of permanent disability.

Claimant's *first chosen specialist* found his wrist condition "stable" and without "any anatomic or functional abnormality or loss. That Dr. Brinkman did not use the technical phrase "zero impairment" does not alter the fact that he found no physical impairment due to Claimant's 1982 industrial injury.

B. *No physician determined that Claimant suffered any physical impairment prior to expiration of the five-year limitations period.*

On August 26, 1983, Claimant asked his treating physician, J.R. Hill, M.D., to recheck his wrists and recommend an exercise program. In his office notes Dr. Hill commented:

> Clinically both arms are fine, we will obtain an x-ray of the right side to be sure it has continued to heal. . . . I believe he can do anything he wis[h]es.

(Claimant Exhibit 3; Defendant Exhibit C.) After having viewed the x-rays, Dr. Hill reported that "I do not feel that Burton Baker will have any permanent disability." (*See* September 29, 1983 Letter of Dr. Hill, Claimant Exhibit 3; Defendant Exhibit C)

This visit to Dr. Hill, which interestingly enough came only

after he was terminated for failure to report to work and which, in retrospect, was an absolutely calculated attempt to get back on the worker's compensation gravy train to try and last out the strike or until another job arose, was the *only* time that the Claimant sought treatment for his wrist condition after the time he left the employ of Louisiana-Pacific in June 1983, a period of more than *seven years.* All other examinations were in regard to evaluation of Claimant's wrist condition, not for treatment.

Dr. Hill and Dr. Brinkman are the only physicians who evaluated Claimant's wrist condition prior to October 21, 1987, five years from the date of injury. Both found no impairment. Thus, for a five-year period, Claimant had *no* physical impairment to his wrists as a result of the industrial accident.

C. *Although Claimant contends that his wrist condition became Progressively worse and that he developed traumatic arthritis he told his own experts his condition had not changed since one year after the accident. Even today he has only minimal physical impairment.*

At the request of Louisiana-Pacific, Claimant saw Dr. Hill again in December 1987. The x-rays taken on *December 1, 1987,* revealed *no* abnormality of the right wrist and mild degenerative changes of the left wrist. (*See* Claimant Exhibit 4.) Based on the x-rays, Dr. Hill couldn't explain Claimant's reported symptoms of involuntary opening of his left hand. Dr. Hill never observed this phenomenon. Dr. Hill described the degenerative changes in the left wrist as "minimal" and again found "no debilitating impairment at this time," but he did note that "degenerative changes can slowly progress." (January 12, 1988, Letter of Dr. Hill, Claimant Exhibit 3.)

In Claimant's case, we are asked to believe such changes evidently progressed so slowly that *no* doctor found that Claimant suffered *any* degree of permanent physical impairment until he was examined by J.S. Blaisdell, M.D., in August 1989, nearly seven years after the industrial accident. Dr. Blaisdell made the following diagnoses:

> 1. Healed, slightly angulated fracture involving the distal right radial shaft with *minimal* angulation and shortening at the fracture site.
>
> 2. Probable fracture involving the articular surface of the distal radius with *minimal* shortening and *possible early* arthritic changes secondary to injury to the articular cartilage of the distal radius (emphasis added).

(Claimant Exhibit 1 at 5.) Even Dr. Blaisdell found only "*possible* early arthritic changes" of the left wrist rather than "traumatic arthritis."

The evidence doesn't support Dr. Blaisdell's impairment rating of fourteen percent. According to the findings of the Industrial Commission, the ratings were broken down as follows: "left arm (4%), right arm (3%), pain (3%), diminished pronation of right forearm (1%), and lifestyle (3%)." (Clerk's Record at 104.)

Dr. Blaisdell's rating was based on erroneous, yet significant, assumptions, and his evaluation was not substantiated by competent evidence. It was Dr. Blaisdell's understanding that Claimant *had not returned to work* after the injuries suffered in his industrial accident:

Q. Okay. So it's your understanding that he didn't return to work after his injury?

A. I'm quite sure that he did not. Not in that capacity, anyway.

Q. He didn't return to the same job he was doing before the accident?

A. Yes, sir.

Q. And you used that information in your impairment rating analysis?

A. Yes. Yes, sir.

(Dr. Blaisdell Deposition at 18, ll. 22-24.)

Moreover, Dr. Blaisdell's evaluation is further revealing since it presents a picture of permanent physical impairment to Claimant's wrist which was not only stable at the time of the evaluation in August 1989, but had remained unchanged since one year following the industrial accident. The Claimant told Dr. Blaisdell his wrist had not changed.

Q. Now, over on Page 2 of your report there, Doctor, under the — I guess it would be the second paragraph of that page — there's a paragraph with an opening word of "status." Have you located that?

A. Yes, sir.

Q. And in that it indicates that the patient's left wrist has shown no change since shortly after treatment was discontinued following his industrial accident. Now, where did you get that information?

A. Directly from the patient.

Q. And that was the patient's statement to you that his left wrist had shown no change since shortly after treatment was discontinued?

A. I believe that's what the report says, yes, sir.

Q. So if, in fact, the last day of examination or treatment by Dr. Hill was on or about August 26, 1983, would that be the day that Mr. Baker was referring to, to the best of your understanding?

A. I wouldn't have any quarrel with that statement, no, sir.

(Dr. Blaisdell Deposition, at 11, 11. 19-25; at 12,11. 1-10 and 11. 21-25; at 13, 11. 1-2.)

In relation to the right wrist Dr. Blaisdell stated:

Q. Further on down on that same page — it would be the fourth paragraph, there's another paragraph that indicates status. And in that it

reflects that the patient claims that there has been no change in the condition of the right upper limb since about one year following the industrial accident; is that correct?

A. Yes, sir.

Q. And is that essentially your understanding of what Mr. Baker related to you on the 24th of August, 1989, when you examined him?

A. I derived that information directly from the patient. That's what he told me.

(Dr. Blaisdell Deposition at 13, ll. 6-20.)

It is unclear how a condition unchanged after one year and with no impairment for five years can miraculously become so highly rated. The repeated assertion that Claimant has suffered from an impairment which has slowly and progressively deteriorated is not substantiated by Dr. Blaisdell's opinions *nor* even by the statements Claimant made to Dr. Blaisdell. (*See* Claimant Exhibit 1.) Indeed, if Claimant's condition, by his own testimony, has remained essentially unchanged since 1983, the 1987 reports of Dr. Hill and Dr. Brinkman are the only ones supported by the evidence. Clearly Dr. Blaisdell's opinion is not.

In addition to the 1987 evaluations by Dr. Hill and Dr. Brinkman, the impairment ratings assessed by Stephen R. Sears, M.D., supported a conclusion that Claimant suffered minimal impairment. Dr. Sears found that Claimant suffered from mild arthritis and provided impairment ratings of 4% of the left upper extremity and 3% of the right upper extremity which converts to 4% whole person impairment. (Clerk's Record at 105.)

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The Commission made the erroneous assumption that Dr. Sears did not allow for pain in his impairment rating. (Clerk's Record at 105.) In fact, during his examination of Claimant Dr. Sears noted that Claimant took no pain medication and exhibited no pain behavior when he made his best effort at range of motion. (Defendant Exhibit T.) In order for pain to be included in an impairment rating under § 72-422 of the Idaho Code, the pain must relate to functional loss. *Urry v. Walker and Fox Masonry Contracts,* 115 Idaho 750, 769 P.2d 1122 (1989). When Claimant did not complain of pain during his examination, there was no reason for Dr. Sears to add percentages for pain.

D. *The Industrial Commission relied heavily upon the 1990 reports of Dr. Hill when Dr. Hill had not even examined the Claimant since 1987.*

The Industrial Commission made another clearly erroneous finding of fact when it stated in Finding V:

> Approximately two-and-a-half years later on May 25, 1990 Dr. Hill *examined Claimant again.* He then found symptomatology compatible with post-traumatic osteoarthritis of the left wrist with chronic pain and activity limiting discomfort and loss of strength. Moreover, he was of the opinion that this condition "would not be expected to improve with time, indeed will more likely increase in severity with time." Claimant's Ex. 3. On June 25, 1990, Dr. Hill agreed with the 14% impairment rating rendered by Dr. J. S. Blaisdell (emphasis added).

(Clerk's Record at 103.)

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In Dr. Hill's May 25, 1990, letter he purported to have recently examined Claimant as the following excerpt demonstrates:

> *On examination* of the patient's upper extremities, there is full range of motion of the shoulders and elbows without pain. *On examination* of the wrists the left wrist as compared to the right in motion, flexion right 50 degrees, left 45 degrees (emphasis added).

(Claimant Exhibit 3, Defendant Exhibit R, May 25, 1990, Letter of Dr. Hill.) In actuality, Dr. Hill had not seen Claimant for his wrist condition *since 1987:*

> Q. In arriving at your impairment evaluation of 15 percent, did you believe at that time that that was prepared that that was a true and correct evaluation?
>
> A. Yes.
>
> Q. Based upon your examination, your familiarity with Mr. Baker?
>
> A. I can't really answer that because my last examination of the wrist was in December of '87.

(Dr. Hill Deposition at 35, 11. 11-20.) In actuality, Dr. Hill had merely restated Dr. Blaisdell's examination to make it appear as if he had recently examined Claimant so that he wouldn't have to be deposed. Depositions are traditionally viewed by practicing physicians as a task akin to being hung by one's fingernails.

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E. *Claimant's Present disability is not caused by his industrial accident.*

The claimant has the burden of proving a causal relationship between the accident and injury and must present medical testimony that supports the causal relationship to a reasonable degree of certainty. *Hagler v. Micron Technology, Inc.*, 118 Idaho 596, 798 P.2d 55 (1990).

The facts of this case are similar to those in *Cole v. Stokely Van Camp*, 118 Idaho 173, 795 P.2d 872 (1990). In that case, Claimant suffered a back injury in an industrial accident in 1982. The canning factory where the claimant worked closed in that same year. Claimant stayed in the area and performed various seasonal jobs, many of which required lifting, bending, and stretching. or the operation of heavy machinery. *Cole*, 795 P.2d, 873. Paralleling the facts of this case, Cole did not consult a physician for treatment of his back condition for a period of five years following his industrial accident. *Id.*

The medical evidence regarding the causal relationship between the injury and Cole's current back problems was conflicting. The Supreme Court upheld the decision of the Industrial Commission denying worker's compensation benefits to Cole based upon the following facts:

> The undisputed facts in this case demonstrate that Mr. Cole did not miss any work at the time of the initial injury to his back, that he did not see a doctor about his back pain for nearly five years, that he performed strenuous labor for employers other than Stokely Van Camp during that five year period, and that he sought

> medical attention only on doctor's advise (sic) against taking a stress test relative to applying at Boise Cascade.

Cole, 795 P.2d at 874.

Implicit in the *Cole* decision was the acknowledgement that factors such as the passage of several years and the many events which could intervene during that time to cause the current physical impairment made it impossible to trace the chain of causation.

In this case, there is no doubt that years of manual labor as a forestry technician were equally and probably more likely to cause traumatic arthritis than Claimant's 1982 industrial accident. Claimant had been working for the United States Forest Service since April 29, 1984. The Industrial Commission described this job as "[all] kinds of fire suppression duties & related duties such as digging, chopping, hiking, breathing smoke & dust, working long and arduous hours." (Clerk's Record at 102.) Claimant testified that he was capable of doing all aspects of his fire-fighter job, a job requiring *heavy* physical labor, including use of a "ground-pounder" pulaski through 1986. (Transcript at 124.) Claimant further testified that he could perform all aspects of a fire fighting job up to the date of the hearing by using a shovel instead of a pulaski. (Transcript at 124.)

Both Dr. Blaisdell and Dr. Goldberg admitted that repetitive trauma to the wrist over years of manual labor would tend to cause traumatic arthritis.

Dr. Goldberg testified that traumatic arthritis can develop from several activities including manual labor and the use of picks, shovels, and axes:

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Q. Dr., can you tell us what sorts of activities or events can cause traumatic arthritis?

. . .

A. Yeah. You can develop traumatic arthritis in the joint spaces from use or abuse, from falls, from sprains or strains, from fractures in and near the joint spaces.

Q. How about manual labor, using a pick, shovel, axe?

A. It may.

Q. How about activities that cause trauma to the joint spaces such as riding a mountain bike?

A. May develop traumatic arthritis from falls. You may develop it from jogging. You may develop it from riding a mountain bike.

(Dr. Goldberg Deposition at 67, ll. 13-25; at 68, 11. 1-9.)

Dr. Blaisdell agreed that one cause of arthritis would be hard usage of the arms in a repetitive matter. (Dr. Blaisdell Deposition at 82, 11. 8-12.)

In the last analysis, the evaluation of impairment must be made at the time claimant's condition was stable and certainly when he voluntarily left the employ of Louisiana-Pacific. At that time and even for five years thereafter it is undisputed that Claimant suffered no impairment. Claimant was of the opinion that

his condition had not changed since one year following the accident. During the eight-year span after Claimant left the employ of Louisiana-Pacific, Claimant has not sought medical treatment and does not use pain medication for his alleged impairment. This is despite years of strenuous physical labor as a forest service technician. Departure from his employment with Louisiana-Pacific, the passage of time, and the physical stresses of Claimant's current occupation break the chain of causation.

II

APPLICATION OF IDAHO CODE § 72-403

The Industrial Commission erred in its application of I.C. § 72-403 to the fact of this case when the evidence is uncontroverted that claimant refused to return to suitable work.

The Industrial Commission held that I.C. § 72-403 only applies in situations where a claimant tries to collect temporary total disability benefits, but could perform some type of work and refuses or neglects to do so. (Clerk's Record at 112-113.) "A well-settled rule of construction is that words of a statute must be given their plain, usual and ordinary meaning, in the absence of any ambiguity." *Walker v. Hensley Trucking*, 107 Idaho 572, 691 P.2d 1187, 1188 (1984). The holding of the Industrial Commission ignores the plain language of the statute:

> Penalty for malingering — Denial of compensation. — If a *Partially disabled employee* refuses to seek suitable work or *refuses* or neglects *to work after suitable work is offered to procured by or secured for him he shall not be entitled to any compensation* (emphasis added).

I.C. § 72-403 (1971). The statute does not differentiate between temporary and permanent partial disability.

The Court is asked to rule that under the facts of this case Claimant is precluded from receiving partial disability benefits by I.C. § 72-403. In this case the Claimant refused suitable work that he had actually been performing without problem. It is hard to imagine a more precise example of what the statute was meant to preclude.

The pertinent facts of this case are (1) prior to leaving the employ of Louisiana-Pacific Claimant was performing his regular full-time employment, "without problem;" (2) Claimant refused to return to work after he and other striking employees were requested to do so by Louisiana-Pacific; (3) at no time did Claimant inform Louisiana-Pacific that he wasn't returning to work due to his medical condition; (4) after a year of receiving strike pay, Claimant went to work for the United States Forest Service as a forestry technician, a position requiring hard, physical labor and repeated trauma to the wrists in using pulaskis and shovels; (5) at the time of the hearing eight years had passed since Claimant's industrial accident; and (6) since leaving the employ of Louisiana-Pacific, Claimant had sought medical treatment for his physical impairment only once for the purpose of trying to get on the worker's compensation gravy train at a time he was on strike and had been terminated.

Claimant's impairment cannot be attributed, some eight years later, to his industrial accident. The major factor breaking the chain of causation is that Claimant made a voluntary and calculated choice. He chose to leave the employ of Louisiana-Pacific and take seasonal employment with the forest service. *At the time that he left the employ of Louisiana-Pacific,* Claimant was fully capable of

performing all levels of physical activity required in his employment with Louisiana-Pacific or any other sawmill. (*See* Claimant Exhibit 1 at 3, Transcript at 142.) Neither the Industrial Commission nor we can speculate what Claimant's condition or work ability would have been had he not refused to work at Louisiana-Pacific. The time that this case is to be evaluated is at the time of his voluntary refusal to work. I.C. § 72-403.

The Arizona case of *Bryant v. Industrial Commission*, 519 P.2d 209 (Ariz. 1974) has similar facts. Bryant, a truck driver, injured his back in an industrial accident suffering permanent partial impairment, but no disability. He then quit his truck driving job and began working as an equipment operator for a mine. Four years later he left that job to become a crane operator on a government project in Colorado. Unfortunately, due to cutbacks the project was terminated. Nearly nine years after his industrial accident, when Bryant was unable to find work paying the equivalent of his pre-injury wage, he filed a claim for readjustment of his compensation. The court upheld the denial of the claim for disability benefits, reasoning that when Bryant terminated his job, he "voluntarily took upon himself certain risks of the marketplace, one of those being that his expectations for his new employment would not be fulfilled." *Bryant*, 519 P.2d at 210. The court held:

> While this Court is not holding that a disabled workman must return to his former employment if he is able and remain there, we are holding that where the predominant cause of an injured workman's changed economic status is of his own making and is similar to the risks encountered by all members of society, the Industrial Commission will not subsidize the injured workman for his miscalculations to

> the exclusion of the uninjured members of the work force.

Id.

As in *Bryant,* Claimant *chose* to leave the employ of Louisiana-Pacific. He did not leave because of any impairment due to his industrial accident. When Claimant left Louisiana-Pacific, he was physically capable of engaging in sawmill work or similar types of work paying wages comparable to his hourly rate for Louisiana-Pacific. The fact is that Claimant's changed economic status is of his own making, not the result of impairment caused by his industrial accident.

When a claimant voluntarily refuses suitable work, I.C. § 72-403 reflects a specific and unambiguous legislative intent that he is deemed to have voluntarily taken upon himself the risks of the market place. If he loses his gamble, our legislature has said quite clearly that his former employer should not be required to compensate him.

For this Court to rule otherwise would be fundamentally and directly contrary to the expressed will and intent of the people of the State of Idaho and would stretch worker's compensation benefits to absurd extremes. Such a strained interpretation of the law will only tax the system even further. If claimants can refuse suitable work and still receive worker's compensation benefits, there will be no end to claims and the system will continue to flounder. Literally every injured worker will be tempted to refuse, not only his prior job, but also job modifications in the hope of striking it rich. The scenario would be clear. If a claimant does not want to do his prior job, he can quit for any reason, and he can argue he suffers disability. Therefore, the employer owes him twenty or

thirty thousand dollars. The employee understands that if he returns to his same job he doesn't get the bankroll. Worker's compensation was *never* intended to compensate a claimant who refuses to work.

We urge that the Court stand strong in support of our codified laws. This is not a time nor place for this Court to interpose its sense of fairness. The legislature has expressed clearly its sense of fairness in this situation. We urge the Court to apply I.C. § 72-403 and reverse the ruling of the Industrial Commission awarding Claimant disability in excess of impairment due to injuries suffered in his industrial accident.

III

DISABILITY IN EXCESS OF IMPAIRMENT

> The conclusion of the Industrial Commission that Claimant suffered thirty-five percent disability is not supported by substantial competent evidence.

At the time he left the employ of Louisiana-Pacific, Claimant was fully performing "medium level" work, and he is currently employed in a job requiring "medium level" work. The absolutely only difference between Claimant's job with Louisiana-Pacific and his current work is that Claimant's job with Louisiana-Pacific that he voluntarily gave up, was year-round and Steve Hamman, the vocational expert engaged by Claimant, based his report that Claimant had lost one-half of the labor market compared to his labor market prior to his industrial accident on the absolutely erroneous *assumption* that Claimant only was capable of performing light or sedentary work:

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> According to Dr. Blaisdell, with concurrence by Dr. Hill, Mr. Baker should definitely avoid the medium level of physical demand in his work activities.

(Steve Hamman Deposition, Exhibit 1, July 21, 1990, Letter to Steve Verby at 3-4.) The uncontradicted facts are that Claimant did not lose the capacity to perform medium level work.

First, although Claimant consulted Dr. Hill regarding back problems and other ailments, he never consulted Dr. Hill or any other physician for problems with his wrists or arms after August 26, 1983. (*See* Claimant Exhibit 3.)

Second, Claimant told Dr. Blaisdell that when he returned to work for Louisiana-Pacific he was able to perform his job operating the edge-chipper "without difficulty" after the first month. (Claimant Exhibit 1 at 3.) This was corroborated by Doug Flory, plant manager, who testified that Claimant was fully performing his duties from the time he returned to work in March 1983 until he left Louisiana-Pacific in June 1983.

Third, Claimant has been performing, since that time, at least medium level work. According to Steve Hamman, vocational consultant, "Sawmill Worker" is a "semi-skilled occupation requiring minimal mathematical and language usage and requiring physical demand levels of medium (lifting/carrying up to 50 pounds) . . . ." (Steve Hamman Deposition, Exhibit 1 at 2.) According to the same report, a "Forester Aide" is a "skilled position requiring medium levels of mathematical and language usage and a medium level of physical demand (50 pounds lifting/carrying). (Steve Hamman Deposition, Exhibit 1 at 3.)

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Claimant attempted to present evidence to show that his current job with the Forest Service has been modified to light-duty work through the testimony of Nan Berger. She testified that Claimant currently fully performs *all* job duties except using a pulaski when he is part of a fire fighting crew and using a hoe-dag to plant trees and that these things are not required.

Claimant testified at the hearing that he did not stop using a pulaski until 1986, *three years* or more after leaving Louisiana-Pacific. Dr. Brinkman examined the Claimant after this date. (Transcript at 31, ll. 14-25; at 32, ll. 1-6; at 34, 11. 6-9.) And it must be remembered that Claimant told his doctors his condition never changed after *one* year.

On March 7, *1986,* Dr. Hill completed a physical examination *approving* Claimant for a fire-fighter job with the Forest Service. The job description is one that would fall within the "*heavy*" classification of work. (*See* Dr. Hill Deposition, Exhibit A.)

Claimant is still able to cross-country ski, play the accordion, and in 1986 took up mountain biking, a sport that is difficult on the arms and wrists according to Claimant. (Transcript at 126.)

Claimant cannot argue that he can no longer work at a sawmill, work of medium level, when he is performing medium level work at the present time. Importantly, Claimant cannot show that his alleged inability to perform sawmill work is caused by his impairment rather than his choice to leave the employ of Louisiana-Pacific.

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IV

BURDEN OF PROOF

Claimant's request to shift the burden of proof to the employer/surety in a partial disability case cannot be heard for the first time on appeal and is unsupported by legal authority.

Claimant contends that the Court should adopt a new rule in partial disability cases similar to the rule in total disability cases. He would have the Court decide that once the claimant has shown a *prima facie* case of inability to return to his former employment, the burden shifts to the employer/surety to show that suitable employment would not result in wage loss. (Brief of Respondent at 31.)

First of all the issue is not relevant because Claimant returned to the place of employment *"without difficulty."*

Secondly, Claimant failed to argue in proceedings before the Industrial Commission the issue of shifting the burden of proof in partial disability cases. It is well established that issues raised for the first time on appeal will not be heard. *Combs v. Kelly Logging*, 115 Idaho 695, 769 P.2d 572, 575 (1989).

In addition, the Idaho Supreme Court may not rule on an issue unless the Industrial Commission has passed on the issue. *Gomez v. Rangen's Inc.*, 105 Idaho 337, 670 P.2d 42, 45 (1983). Of course, since Claimant did not raise the argument before the Commission, the Commission entered no findings or conclusions of law relating to shifting the burden of proof in partial disability cases, precluding the Court from ruling on the issue.

Finally, Claimant has failed to present rationale, court rulings, or statutory support for promulgating a rule shifting the burden of proof. Since Claimant has not demonstrated how the longstanding rule regarding the burden of proof in partial disability cases prejudices him, the Court is urged to disregard Claimant's suggestion to shift the burden of proof.

V

ATTORNEY FEES ON APPEAL

Claimant is not entitled to attorney fees on appeal when the issue raised by appellant is one of first impression in the State of Idaho and when Claimant himself requests the Idaho Supreme Court to establish a new rule of law.

Claimant asserts that he should be awarded attorney fees on appeal because Defendant has no more than invited the Idaho Supreme Court to second-guess the Industrial Commission on conflicting evidence. (Brief of Respondent at 13.)

The standard for an award of attorney fees on appeal in worker's compensation cases is set forth in *Kinny v. Tupperware Co.*, 117 Idaho 765, 792 P.2d 330 (1990). Since worker's compensation law forms a remedy for an injured worker in lieu of bringing a civil action in district court, I.C. § 12-121 and I.R.C.P. 54(e)(1) do not apply. Instead, the Idaho Supreme Court relied on I.C. § 72-804 in adopting the criterion of whether the employer/surety has appealed a decision of the Industrial Commission "without reasonable ground." *Kinny*, 792 P.2d at 336.

A party cannot be said to have appealed "unreasonably" when

the issues presented raise a significant issue of law, the findings of the tribunal below were arguably unsupported by substantial evidence, or the reviewing court was asked to establish new legal standards or modify existing legal standards. *See, e.g. Excel Leasing Co. v. Christensen,* 115 Idaho 708, 769 P.2d 585 (Idaho. App. 1989).

In this case, the Court is requested to establish new legal standards by both parties. The principal dispute in this case is the application of I.C. § 72-403, an issue of first impression in the State of Idaho. Although the interpretation of I.C. § 72-403 was raised in *Gomez v. Rangen's. Inc.,* 105 Idaho 337, 670 P.2d 42 (1983), the Idaho Supreme Court remanded the case without ruling on the issue because the Industrial Commission had failed to make specific findings and conclusions of law on the application of the statute. *Gomez,* 670 P.2d at 45. A second appeal was never heard.

Secondly, Claimant himself requests the Court to fashion a new rule shifting the burden of proof to the employer on the issue of suitable employment in partial disability cases, similar to the rule in total permanent disability cases. (*See* Brief of Respondent at 31.)

CONCLUSION

The fundamental issue presented for determination in this case is whether I.C. § 72-403 means what it says. Yes, the statute is harsh; it is purposely so. The type of conduct addressed by the statute is repugnant to the entire concept of worker's compensation benefits which are only for those who are unable to work because of an industrial injury This section is a death penalty. Yes, the death penalty is harsh but it is reserved for specific harsh crimes. Yes, the penalty of no compensation is harsh but it is likewise reserved for

very specific harsh conduct. Once that conduct occurs there is no question that the penalty occurs. The Claimant's conduct in this case is *exactly* the type of conduct to which this section was intended to apply. It should be so applied.

Claimant's counsel concedes at page 26 of his Brief, that I.C. § 72-403 would apply to temporary total disability benefits. It is Defendant's position, pure and simple, that there is absolutely no basis to distinguish between what Claimant seeks and what he concedes. By this concession Claimant admits that he voluntarily, intentionally, and without coercion refused a suitable job, his regular pre-injury job. Claimant concedes that he voluntarily took upon himself the risks of the market place and that he might not get his job back after the strike and that he might not be able to find as a job paying as high a wage.

Claimant's concession is important also because the statute does not modify the term of art, "partially disabled." It does not distinguish between "temporarily partially disabled" and "permanently partially disabled." It quite clearly says "partially disabled." The fact of the matter is that if Claimant claims he is "partially disabled," then, because of his conduct refusing suitable work, he is entitled to no compensation. If he does not claim that he is "partially disabled," he is entitled to no compensation. Either way you cut it, the answer is the same; the Claimant is entitled to no compensation. A claimant may not like the answer. That is fine. That still does not change the answer.

Justice Huntley was for many years a capable and able jurist. He authored many fine opinions. He even agreed with counsel for Defendant in a dissenting opinion in *Yeend v. United Parcel Service, Inc.*, 104 Idaho 333, 659 P.2d 87 (1982). In *Gomez v. Rangen's*, 105 Idaho 337, 670 P.2d 42 (1983), however, Justice

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Huntley strayed beyond the primary cannon of statutory construction that one must adhere to the clear expression of legislative intent. To quote Justice Huntley in his concurring opinion:

> It would make no sense to rule that a worker forfeits permanent partial disability entitlement . . . .

The point is, it is not up to him as a jurist to rule on whether or not the action of the legislature makes "sense." If the law is clear, it should be enforced unless it is unconstitutional. There is no claim here that I.C. § 72-403 is unconstitutional.

This Court should avoid the temptation to interject its own opinion of what makes "sense" and uphold what the legislature has already told us makes "sense."

In some cases, it can be argued all through the day and long into the night as to what is right and what is wrong and that is why we have established a legislature to tell us through statutes what is right and what is wrong. In those instances when the legislature is not clear and precise in telling us what is right and wrong, we turn to the judiciary for interpretation. In this case it is clear that the legislature has determined what is right and what is wrong. The legislature has said, quite clearly, that a claimant who refuses suitable work is not entitled to any compensation. The decision of the Industrial Commission should be reversed.

RESPECTFULLY submitted this 3rd day of January, 1992

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SIMS, LIESCHE, NEWELL, KELSO,
WALLACE & WALLACE, P.A.

/s/ Starr Kelso
STARR KELSO

CERTIFICATE OF MAILING:

I hereby certify that a true and correct copy of the foregoing document was mailed via regular mail, postage prepaid on the 3rd day of January, 1992, to:

Steven C. Verby
Attorney at Law
Post Office Box 1005
Sandpoint, Idaho 83864

/s/ Starr Kelso

APPENDIX I — APPELLANT'S PETITION FOR REHEARING PURSUANT TO IDAHO APPELLATE RULES, RULE 42 DATED MARCH 30, 1993

IN THE SUPREME COURT OF THE STATE OF IDAHO

S. Ct. No. 19430

BURTON BAKER,

Claimant-Respondent,

vs.

LOUISIANA-PACIFIC CORPORATION, Employer,

Defendant-Appellant.

APPELLANT'S PETITION FOR REHEARING PURSUANT TO IDAHO APPELLATE RULES, RULE 42

COMES NOW, the above-named Appellant, Louisiana-Pacific Corporation, by and through its attorney of record, Starr Kelso, and does hereby petition this Court for rehearing in this appeal. The basis of this motion, shall be more fully set forth in Appellant's Brief in Support of Petition for Rehearing to be filed herewith within fourteen days of the filing of this Petition. The basis of this Petition is:

1. This Court violated Article V, Section 9, of the Constitution of the State of Idaho, by entering findings of fact; and

2. This Court violated the Appellant's right to due process under the Fourteenth Amendment to the Constitution of the United States and

3. The Court's opinion has the appearance of being unconstitutionally biased in violation of Appellant's right to due process under the Fourteenth Amendment of the Constitution of the United States and in violation of Appellant's right to the administration of justice without prejudice under Article I, Section 18 of the Constitution of the State of Idaho; and

4. The award of attorney's fees is not supported by law or the opinion of the Court.

DATED this 30th day of March, 1993.

SIMS, LIESCHE, NEWELL, KELSO,
WALLACE & WALLACE, P.A.
s/ Stankeler

CERTIFICATE OF SERVICE

This is to certify that on this 30th day of March, 1993, the undersigned served at true and correct copy of the foregoing upon the following individuals by depositing a true and correct copy of the same in the United States mails, postpaid, and addressed as follows:

STEVEN C. VERBY
Attorney at Law
PO Box 1005
Sandpoint, Idaho 83864

BY: s/ Starr Kelso

APPENDIX J — APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR REHEARING DATED MARCH 30, 1993

IN THE SUPREME COURT OF THE STATE OF IDAHO

S. Ct. No. 19430

BURTON BAKER,

Claimant-Respondent,

vs.

LOUISIANA-PACIFIC CORPORATION, Employer,

Defendant-Appellant.

APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR REHEARING

I.

The Court Exceeded its Scope of Review By Entering a Finding of Fact on the "Threshold Issue."

The Industrial Commission held as a matter of law that Idaho Code § 72-403 *does not apply to permanent* partial disability. The Commission held that § 72-403 applied only to *temporary* disability benefits. (Clerk's Record at 112-113).

Appellant's argument was based on the premise that, contrary to Justice Huntley's concurring opinion in *Gomez v. Rangen's Inc.*, Idaho Code, § 72-403, as a matter of law, applied to *all* partially disabled employees, be they temporary disabilities or permanent disabilities.

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The opinion of this Court written by Justice Bistline, in fact, actually adopted Appellant's argument.

> "As is plain from the text of the statute, Idaho Code § 72-403 is limited to partially disabled workers who refuse to accept suitable work."

The "threshold (factual) question" under Idaho Code § 72-403 announced, for the very first time by this Court, is

> "Whether Baker was a partially disabled employee at the time he refused to return to work."

The decision of the Industrial Commission should have been reversed and remanded at that point in time because the Industrial Commission *never* considered or decided the factual issue of whether Claimant was partially disabled *at the time of his failure to cross the picket line.* It is submitted the Commission didn't consider this factual issue because he was not *temporarily* disabled at the time and the Industrial Commission was of the opinion, following Justice Huntley's *Gomez* concurring opinion, the statute only applied to temporary disability so there probably was no reason, in their view, to decide the question. The Industrial Commission did not consider or decide this "threshold (factual) question" because prior to this Court's decision, it had never before been announced. Nowhere in the Industrial Commission decision is the resolution of this threshold factual issue determined. This Court's opinion erroneously proceeds to answer the threshold question of fact:

> "*We conclude* he was not partially disabled at that time." (Emphasis added).

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This Court is limited to a review of questions of law. The resolution of the "threshold question" by this Court is clear error.

The case law is clear;

> "*The determination of the extent of a claimant's disability is a factual matter for the Industrial Commission.*" *Griffin v. Potlatch Forests, Inc.*, 93 Idaho 174, 457 P. 2d, 413 (1969); *Frank v. Bunker Hill Co.*, 117 Idaho 790, 792 P.2d 815 (1990). (Emphasis added).

The Industrial Commission made no finding of fact as to the extent, if any, of Claimant's disability *at the time of his refusal to work.*

The Idaho Constitution uses the word "shall" and leaves no doubt as to its intentions:

> "On appeal from orders of the industrial accident board the Court *shall be limited to a review of questions of law.*" Idaho Constitution, Article V, Section 9. (Emphasis added). (See also *Houser v. Southern Idaho Pipe & Steel Inc.*, 103 Idaho 441, 649 P.2d 1197; Idaho Code § 72-724(2) and Idaho Code § 72-732(1).

To fail to reverse and remand, and to allow the Industrial Commission to enter appropriate findings of fact in the face of this Constitutional mandate, would be a direct violation of Article V, Section 9, of the Constitution of the State of Idaho. Further, to fail to reverse and remand would be a direct violation of Appellant's Constitutional right to due process under the Due Process Clause

of the Fourteenth Amendment of the Constitution of the United States because of the failure to follow the Constitutional mandate of Article V, Section 9 of the Constitution of the State of Idaho. (See *Toussaint v. Rushen,* 553 F. Supp. 1365, (N.D. Cal. 1983).

II

". . . that Lowly Form of Life." Should be Stricken. (See Footnote No. 1)

Certainly, a member of a union who refuses to strike or who returns to work before a strike has ended, is by definition a scab laborer. (See Webster Third New International Dictionary, 2022 (1971); the American Heritage Dictionary, Second College Addition, p. 1094 (1991)). Scabs are not, however, under any definition of the term a "lowly form of life." One's personal partisan opinion may be that they are in fact, a "lowly form of life" but partisan personal opinions have no place in the opinions of the Supreme Court of the State of Idaho.

A personal opinion interjects a partisan flavor to the opinion in an area that is certainly controversial enough as it is without our Court taking sides. For a Justice(s) to take a partisan side he must occupy two practically and seriously inconsistent positions, one partisan and one judicial and to do so violates the Due Process of Law rights of the litigants. (See *Ward v. Village of Monroeville, Ohio,* 409 U.S. 57, 93 S. Ct. 80 (1972).

Our system of justice has as its foundation the principle that judges/justices are to conduct themselves,

> "at all times in a manner that does not detract from public confidence and the integrity and

impartiality of the judiciary." (Code of Judicial Conduct, Canon 2(A)).

For any Supreme Court Justice to perform his/her high function, they "must satisfy the appearance of justice." (See *Aetna Life Insurance Co. v. LaVoie*, 475 U.S. 813, 106 S. Ct. 1580 (1986)).

Certainly Footnote No. 1 of the opinion is indicative of a partisan bias in favor of union sympathizers and against union members who choose to work, during a strike, and against Appellant. It is submitted, while it is certainly not known, it appears as though this partisan bias is what led the Court's opinion to fail to perform the legal analysis which the law requires, e.g., leave findings of fact to the Commissioh and remand to it to enter its findings of fact.

An opinion of this Court that could be used by unions or union members to coerce a person to not cross a picket line, does not satisfy the appearance of justice and is of such a nature and character as would render it improbable that Appellant would receive a fair and impartial hearing. (See *Idaho State Constitution*, Article I, Section 18; *Bell v. Bell*, 18 Id. 636, 111 P.2d 1074 (1910). This appearance reflected by Footnote No. 1 cannot be differentiated from the appearance raised in *Harry Carian Sales v. Agr. Labor Rela. Bd.*, 703 P.2d 27, 54, (Cal. 1985), where a leaflet was distributed likening female union organizers to prostitutes (low life's?) was found to constitute an unfair labor practice. If a Justice of our Supreme Court were to liken female union organizers to a prostitute, would it detract from the integrity and impartiality of the judiciary? Would it be an unfair labor practice for a union to distribute leaflet copies of this Court's opinion that scabs are "lowly form(s) of life" to coerce people contemplating

crossing a picket line to not do so. Already in the record in this case are the names of Jim Collier, Mike Ashby, and Steve Economu, union members who chose to do what Baker refused to do, cross the picket line, and continue to work for Appellant. Footnote No. 1 holds forever more that these people are "lowly forms of life." These persons would disagree and it is submitted that these persons would argue quite frankly and forcibly far far better than counsel for Appellant that Canon 2(A) has been forgotten. How are they going to feel if Baker or some other union member shows them or their family a copy of the decision? It is submitted that these innocent bystanders would argue that the Footnote No. 1 detracts from their confidence and integrity in the impartiality of the judiciary.

One only has to consider a simple hypothetical to determine whether or not Footnote No. 1 detracts from public confidence in the integrity and impartiality of the judiciary. Let's take the example of a person, a scab by definition, who crosses a picket line, and according to this Court's opinion is a "lowly form of life." This person, while crossing the picket line, is beaten severely or perhaps, as seems to be the trend these days, shot. Let's say that this person then decides to sue the person who shot him and perhaps, even the union that may have influenced the actions of the person who shot him. What chance is there that that person who was shot would feel that he/she would get a fair hearing on review before a Court that had given its "opinion" that people who cross picket lines are "lowly forms of life."

People who cross picket lines and people who disagree with unions are not "lowly forms of life." They are merely people, who like anyone else, are entitled to make their own decisions relative to unions and strikes.

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Calling upon personal partisan opinions in the forum of a Court opinion can do nothing but detract from public confidence in the integrity and the impartiality of the judiciary. (See *Murchinson v. White,* 349 U.S. 133, 75 S. Ct. 623 (1953). The citizens, including in that term corporations (see *Bissett v. Unnamed Members of Political Compact,* 111 Idaho 863, 727 P.2d 1291 (Ct. App. 1986))) of the State of Idaho, rely upon its judiciary to be fair and impartial.

The above quoted portion of Footnote No. 1 should be withdrawn and the entire matter remanded to the Industrial Commission to enter findings of fact on the threshold issue. Anything less would violate Article I, Section 18 of the Idaho Constitution and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States

III

No Attorney Fees are Properly Awardable to Claimant in This Case.

Under Idaho Code § 72-804, this Court may award attorney's fees if a claim is contested "without reasonable grounds." As already noted, the opinion of the Court adopts the argument of Appellant; e.g., that "partially disabled" as used in Idaho Code § 72-403 refers to just that. It does not mean "temporarily partially disabled" as held by the Industrial Commission below.

As Appellant argued at page 18 of its opening brief,

> "The conclusion of the Industrial Commission is that "partially disabled" refers only to temporary partial disability. That definition is not supportable."

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A party cannot be said to have "appealed unreasonably" when the issue presented raises a significant issue of law. *Excel Leasing Co. v. Christensen*, 115 Idaho 708, 769 P.2d 585 (Idaho App. 1989); *Kenny v. Tupperware Co.*, 117 Idaho 765, 792 P.2 330 (1990).

The Appellant's primary issue in this case concerned the application of Idaho Code § 72-403, an issue of first impression in the State of Idaho. No attorney's fees should be awarded in first impression cases. (See *Yardly v. Chuck's Freezer Meats*, 91 IWCD 55, Sup.Ct. No. 19451, Op. No. 10 (1993). There are no prior cases that interpret this statute. The only other case to come before this Court, *Gomez v. Rangen's Inc.*, 105 Idaho 337, 670 P.2d 42 (1983), concerning this statute was remanded to the Industrial Commission to makes specific findings and conclusions of law on the application of the statute. No threshold question test was announced by the Court in that case, and, in fact until this opinion, the Industrial Commission was proceeding under the erroneous opinion that Idaho Code § 72-403 only applied to "temporary partial disability."

Where did the "threshold question" test come from? If there was a case, why was it not cited by the Industrial Commission decision and why did the whole argument before the Commission focus on whether or not Justice Huntley was correct in *Gomez, supra.*, when he argued I.C. § 72-403 only applied to temporary and not permanent disabilities.

The awarding of attorney's fees on appeal in this case violates the appearance of justice. Given the fact that the argument of Appellant was adopted by the Court, the punishment of attorney's fees is unsupportable and can be viewed only as an outgrowth of the partisan support exhibited by Footnote No. 1 in favor of union sympathizers.

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IV

Conclusion

What, exactly, is the appearance of justice? In many ways, it probably is like obscenity, in other words you know it when you see it. Likewise, you know it when it is missing.

Appellant can accept an adverse decision and Appellant can accept an interpretation of the law contrary to its own. Appellant cannot accept, nor can it permit it to go unchallenged, disregard of its Constitutionally protected right to have questions of fact decided by the Industrial Commission and to have, at the very least, a decision rendered by an impartial judiciary that reflects the appearance of justice. Constitutional rights are to be jealously guarded by all.

It takes but a review of the opinion in this matter to see that an entry of a Finding of Fact in violation of Article V, Section 9 has occurred. While it is objectionable that this has occurred in an opinion of the Supreme Court, the truly objectionable part is every appearance exists that the reason for it is the partisan opinion reflected in Footnote No. 1; a partisan personal opinion on whether Baker could have crossed the picket line to work as three others did as opposed to review of the statutory law. It is further objectionable that the opinion actually adopts Appellant's interpretation of the plain language of the statute but then finds its argument "utterly without merit" which tends to lend support to the appearance that the reason for the decision was the Footnote No. 1 personal opinion.

In the end result, if the opinion in this case is not withdrawn, and that matter remanded for determination by the Industrial

Commission on the "threshold question" the greatest loss will be that which our legal system will suffer to its "appearance of fairness."

The "appearance of justice", the parties, and our legal system will be best served, if this Court, at a minimum (1) withdraws its opinion in this matter; (2) issues a new opinion adopting the "threshold question" test of whether Baker was partially disabled at the time he refused to return to work; strike any reference to "lowly forms of life"; and deny the award of attorney's fees; and (3) remand this matter to the Industrial Commission for determination of the "threshold question."

DATED this 30th day of March, 1993.

SIMS, LIESCHE, NEWELL, KELSO,
WALLACE & WALLACE, P.A.
s/ Stankeler

CERTIFICATE OF SERVICE

This is to certify that on this 30th day of March, 1993, the undersigned served at true and correct copy of the foregoing upon the following individuals by depositing a true and correct copy of the same in the United States mails, postpaid, and addressed as follows:

STEVEN C. VERBY
Attorney at Law
PO Box 1005
Sandpoint, Idaho 83864

BY: Starr Kelso

APPENDIX K — APPELLANT'S MOTION FOR JUSTICE BISTLINE TO RECUSE HIMSELF FROM FURTHER PROCEEDINGS IN THIS MATTER DATED MARCH 30, 1993

IN THE SUPREME COURT OF THE STATE OF IDAHO

S. Ct. No. 19430

BURTON BAKER,

Claimant-Respondent,

vs.

LOUISIANA-PACIFIC CORPORATION, Employer,

Defendant-Appellant.

APPELLANT'S MOTION FOR JUSTICE BISTLINE TO RECUSE HIMSELF FROM FURTHER PROCEEDINGS IN THIS MATTER

COMES NOW the above-named Appellant Louisiana-Pacific Corporation, by and through its attorney of record, Starr Kelso, and does hereby move that Justice Bistline recuse himself from any further participation in this matter before the Court.

The basis of this motion is IAR Rule 48, IRCP Rule 40 (d)(2)(A)(4) and the Code of Judicial Conduct, the Affidavit of Counsel, and Justice Bistline's personal partisan opinion at Footnote No. 1 which raises questions as to the "appearance of justice" and the appearance of bias and prejudice in favor of Baker and against Appellant in this matter. Pursuant to Canon 3(C)(1) of

the Code of Judicial Conduct, Justice Bistline should disqualify himself. Justice Bistline's personal partisan opinion violates Appellant's due process rights guaranteed by the Fourteenth. Amendment to the Constitution of the United States. (See *Ward v. Village of Monroeville*, Ohio 409 U.S. 57, 93 S. Ct. 80 (1972); *Aetna Life Insurance Company v. LaVoie*, 475 U.S. 813, 106 S.Ct. 1580 (1986); *Murchinson v. White*, 349 U.S. 133, 75 S. Ct., 623 (1953).

Justice Bistline's personal partisan opinion is inappropriate and fails to meet the Constitutional requirement of the "appearance of justice" especially when several Canons of the Code of Judicial conduct are considered:

> "Canon 1 — ". . . a judge should participate in establishing, maintaining, and enforcing, and shall himself observe high standards of conduct so that the integrity and Independence of the judiciary may be preserved . . ."
>
> "Canon 2 — "A. A judge should conduct himself at all times in a manner that does not detract from public confidence in the integrity and impartiality of the judiciary. B.". . . he shall not lend the prestige of his office to advance the private interest of others;"
>
> Canon 3 — . . . "A. . . . 1. A Judge should be unswayed by partisan interest . . . 4. A Judge . . . should not initiate ex parte communications concerning a pending or impending proceeding. C. Disqualification. 1. A Judge should disqualify himself in a

> proceeding in which he deems his impartiality might reasonably be questioned...he shall disqualify himself in instances where: a. He has a personal bias or prejudtce concerning a party . . ."

As further basis for this Motion to Recuse, Appellant submits simultaneously herewith Appellant's brief in support of motion for Justice Bistline to Recuse himself and Appellant's Brief in Support of Petition for Rehearing.

DATED this 30th day of March, 1993.

SIMS, LIESCHE, NEWELL, KELSO,
WALLACE & WALLACE, P.A.
s/ Starr Kelso

CERTIFICATE OF SERVICE

This is to certify that on this 30th day of March, 1993, the undersigned served at true and correct copy of the foregoing upon the following individuals by depositing a true and correct copy of the same in the United States mails, postpaid, and addressed as follows:

STEVEN C. VERBY
Attorney at Law
PO Box 1005
Sandpoint, Idaho 83864

BY: s/ Starr Kelso

APPENDIX L — ICRD RULE 40(D)(2) AFFIDAVIT OF COUNSEL DATED MARCH 30, 1993

IN THE SUPREME COURT OF THE STATE OF IDAHO

S. Ct. No. 19430

BURTON BAKER,

Claimant-Respondent,

vs.

LOUISIANA-PACIFIC CORPORATION, Employer,

Defendant-Appellant.

IRCD RULE 40(D)(2)
AFFIDAVIT OF COUNSEL

State of Idaho,]
ss.
County of Kootenai]

STARR KELSO, being first duly sworn upon oath, hereby states as follows:

1. That I am the attorney of record for the Appellant, Louisiana-Pacific Corporation in the above-referenced matter and that I am licensed to practice law in the State of Idaho;

2. That the Motion for Justice Bistline to Recuse Himself is based upon the following grounds:

a. Canon 3 of the Code of Judicial Conduct; Article I, Section 18 of the Constitution of the State of Idaho;

b. Article V, Section 9 of the Constitution of the State of Idaho;

c. The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States;

d. The cases cited in Appellant's Brief in Support of Motion.

2. That the facts relied upon in support of the Motion to Recuse are:

a. The entry of a finding of fact in the opinion, in answer to the threshold question of whether Baker was partially disabled at the time he refused to return to work, to-wit: "We conclude he was not partially disabled at that time.";

b. The opinion of Justice Bistline at Footnote No. 1 that "Louisiana-Pacific did not offer Baker a "suitable job" within the meaning of the statute being that the job offer was contingent on Baker crossing the picket line and thereafter being that lowly form of life aptly known as a "scab" laborer;

c. The holding in the opinion that "Louisiana-Pacific's contention that I.C. § 72-403 barred recovery by Baker was utterly without merit for the reasons explained above."

d. That shortly after oral argument before the

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Supreme Court, I observed Justice Bistline, out-of-robe, conversing with Baker in the Courtroom in which oral argument was heard.

Further Affiant sayeth not.

DATED this 30th day of March, 1993.

s/ Starr Kelso
STARR KELSO

State of Idaho,]
ss.
County of Kootenai,]

On this 30th day of March, 1993, before me, the undersigned Notary Public for the State of Idaho, personally appeared STARR KELSO, and acknowledged to me that he has read the foregoing and that the same is true to the best of his knowledge and belief.

IN WITNESS WHEREOF, I have hereunto set my and seal the day and year in this Certificate first above written.

s/ Mary A. Salise
Notary Public for the State of
Idaho, residing at Post Falls,
My Commission expires: 8/24/96.

APPENDIX M — APPELLANT'S BRIEF IN SUPPORT OF ITS MOTION FOR JUSTICE BISTLINE TO RECUSE HIMSELF DATED MARCH 30, 1993

IN THE SUPREME COURT OF THE STATE OF IDAHO

S. Ct. No. 19430

BURTON BAKER,

Claimant-Respondent,

vs.

LOUISIANA-PACIFIC CORPORATION, Employer,

Defendant-Appellant.

APPELLANT'S BRIEF IN SUPPORT OF MOTION FOR JUSTICE BISTLINE TO RECUSE HIMSELF

Justice Bistline is aware of the Supreme Court's scope of review on appeal from Industrial Commission cases. To quote Justice Bistline,

> "This Court's review on appeal from a Commission's decision is limited to questions of law, and an ascertainment as to whether the Industrial Commission's factual findings are based on substantially competent evidence." *Loya v. J.R. Simplot Company,* 120 Idaho 62, 813 P.2d 873 (1991).

Why this basic fundamental standard would be so clearly

disregarded is not known. It is submitted that the standard of review was ignored due to Constitutional bias and prejudice of such a nature as to render it improbable that Appellant would receive a fair hearing. (See *Bell v. Bell*, 18 Idaho 636, 111 P.2d 1074 (1910)). Questioning the impartiality of a Justice is as comfortable as choking, but so is reading an opinion where a Constitutional mandate is ignored.

While Blackstone is correct that the law will not suppose bias, the converse is true that once even the appearance of bias surfaces it should be immediately removed. (See 3 W. Blackstone, commentaries 361; *Aetna Life Insurance Company v. LaVoie*, 475 US 813, 106, S. Court Ct. 1580 (1986)).

A reading of Justice Bistline's Footnote No. 1 reveals a personal partisan opinion that has no place in the resolution of the legal rights and responsibilities of the parties let alone in a Supreme Court opinion. (See *Ward v. Village of Monroeville*, Ohio, 49 U.S. 57, 93 S. Ct. 80, (1972)). The interjection of a personal partisan opinion of this nature into a judicial proceeding can do nothing but detract from public confidence in the integrity and impartiality of the judiciary. (see Code of Judicial Conduct, Canon 2(A)). The interjection of a personal partisan opinion into Footnote No. 1 offends principles of justice so rooted in the traditions and conscience of the citizens of the United States as to be rated as fundamental. Justice shall be administered without prejudice. (See Article I, Section 18, Constitution of the State of Idaho). Everyone is entitled to a fair and impartial hearing. The very essence of the judiciary is the ability to disregard partisan opinions and decide cases based on fact and law and not bias.

Footnote No. 1 is so egregious in and of itself that it should be found as a matter of law to be reflective of bias and prejudice

violative of Appellant's constitutional right to due process under the due process clause of the Fourteenth Amendment of the United States Constitution and the Constitution of the State of Idaho. If not, the ignoring of a Constitutional mandate against the entry of findings of fact, by our Supreme Court should be proof enough of the existence of Constitutionally prohibited bias or prejudice.

This is an extreme case and it Constitutionally mandates disqualification. Footnote No. 1 does not satisfy the "appearance of justice test." Justice Bistline should disqualify himself because, at a minimum, the Footnote No. 1 personal partisan opinion, when coupled with his post-oral argument discussion with Baker, raises a reasonable question as to his impartiality. (see Code of Judicial Conduct cited in Motion). It is not known who initiated the conversation or what was even said , but it certainly would seem odd for Baker to have initiated the conversation. Mere retraction of Footnote No. 1 is not sufficient; The damage has been done, the impermissive thought and conduct revealed. To merely retract the personal opinion only leaves unspoken that which has been thought and which does not meet the appearance of justice.

Justice Bistline should recuse himself from participating in any further or other proceedings in this matter.

DATED this 30th day of March, 1993.

SIMS, LIESCHE, NEWELL, KELSO,
WALLACE & WALLACE, P.A.
s/ Starr Kelso

Appendix M

CERTIFICATE OF SERVICE

This is to certify that on this 30th day of March, 1993, the undersigned served at true and correct copy of the foregoing upon the following individuals by depositing a true and correct copy of the same in the United States mails, postpaid, and addressed as follows:

STEVEN C. VERBY
Attorney at Law
PO Box 1005
Sandpoint, Idaho 83864

BY: s/ Starr Kelso

APPENDIX N — BURTON BAKER'S BRIEF IN OPPOSITION TO PETITION FOR REHEARING AND IN OPPOSITION TO MOTION TO DISQUALIFY JUSTICE BISTLINE DATED APRIL 12, 1993

VERBY LAW OFFICE
STEVE VERBY
Attorney at Law
113 North Second Avenue
P. O. Box 1005
Sandpoint, ID 83864

IN THE SUPREME COURT OF THE STATE OF IDAHO

SUPREME COURT DOCKET NO. 19430

BURTON BAKER,

Claimant/Respondent,

vs.

LOUISIANA-PACIFIC CORPORATION,

Defendant/Appellant.

BURTON BAKER'S BRIEF IN OPPOSITION TO PETITION FOR REHEARING AND IN OPPOSITION TO MOTION TO DISQUALIFY JUSTICE BISTLINE

COMES NOW, Steve Verby, attorney of record for Burton Baker, the above-named Claimant-Respondent, and submits this brief in opposition to the Defendant's petition for rehearing and in opposition to Defendant's motion to disqualify Justice Bistline. This response is made pursuant to Idaho Appellate Rule 32(d).

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In its brief in support of its petition for rehearing Louisiana-Pacific Corporation made three arguments:

1. The Idaho Supreme Court made a "finding of fact;"

2. It disagreed with the language used by the author of the opinion in footnote one;

3. It contended that no attorney's fees should be awarded.

In its motion to disqualify Justice Bistline, Defendant Louisiana-Pacific Corporation's arguments can be summarized as follows:

A. Justice Bistline is unfair because he authored an opinion which stated Burton Baker was not disabled when he refused to cross the picket line;

B. Justice Bistline is unfair because he stated a job as a scab would not be "suitable" work.

This brief will address the Defendant's allegations in the order outlined above.

ARGUMENT

I. The Court did not make a "finding of fact."

Defendant-Appellant, Louisiana-Pacific Corporation argues that the Supreme Court made a finding of fact on a "threshold issue." Once again, Louisiana-Pacific Corporation attempts to misconstrue the record to serve its own purposes. The Supreme Court did not make a "finding of fact" on a threshold issue. The

Supreme Court simply restated the uncontroverted evidence that appeared from the record. The Court stated that Burton Baker was not "partially disabled" at the time he refused to cross the picket line. As can be seen from the record, Dr. Hill, the only physician who rendered an opinlon concerning impairment at the time Burton Baker returned to work, stated in his records that Burton Baker did not have a permanent partial impairment at the time he returned to work. There is no other medical evidence presented in the record concerning impairment or disability at the time Burton Baker returned to work for Defendant Louisiana-Pacific. As stated in *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 74 P.2d 171 (1937):

> "The rule applicable to all witnesses, whether parties or interested in the event of an action, is, that either a board, court, or jury must accept as true the positive, uncontradicted testimony of a credible witness, unless his testimony is inherently improbable, or rendered so by facts and circumstances disclosed at the hearing or trial. Manley v. Harvey Lumber Co., 175 Minn. 489, 221 N.W. 913, 914. In Jeffrey v. Trouse, 100 Mont. 538, 50 P.2d 872, 874, it is held that neither the trial court nor a jury may arbitrarily or capriciously disregard the testimony of a witness unimpeached by any of the modes known to the law, if such testimony does not exceed probability. And in Arundel v. Turk, 16 Cal.App.2d 293, 60 P.2d 486, 487, 488, the rule is stated thus; 'Testimony which is inherently improbable may be disregarded, * * * but to warrant such action there must exist either a physical impossibility of the evidence being true, or its falsity must be apparent, without any

resort to inferences or deductions." 74 P. 2d 171 at 175.

Thus, in this case, the Court did nothing other than state what the uncontroverted medical evidence was; that Burton Baker was not a partially disabled individual at the time he returned to work. This was not a "finding of fact" since there was absolutely no other medical evidence on this issue.

Alternatively, it can be said the Court made a legal conclusion based upon the uncontested facts presented. In this case, when faced with the uncontroverted fact that Burton Baker did not have a rateable impairment at the time he returned to work in March of 1983, the Court legally "concluded" that Mr. Baker did not have a permanent partial disability. Thus, the "threshold question to be answered" is one of law. The legal conclusion to be reached was whether or not the uncontroverted facts would result in a legal determination that Burton Baker was a "partially disabled employee" at the time he returned to work. Applying the uncontested facts to statutory law results in a legal conclusion. After applying Idaho Code § 72-424 (permanent impairment evaluation) and Idaho Code § 72425 (permanent disability evaluation) the Court reached the legal conclusion that Burton Baker was not a partially disabled employee in March of 1983.

Defendant Louisiana-Pacific also states that this Court "actually adopted Appellant's argument." (See Appellant's Brief in Support of Petition for Rehearing, p. 1.) This statement by Louisiana-Pacific takes statements of the opinion out of context. It is another attempt to mislead the Court.

The original opinion in this case did not make a ruling on the applicability of Idaho Code § 72-403 in cases of permanent partial

disability. In fact, it specifically concluded that Idaho Code § 72-403 was inapplicable. The full paragraph of the Court's opinion states:

> "As is plain from the text of the statute, Idaho Code § 72-403 is limited to partially disabled workers who refuse to accept suitable work. Thus, the threshold question to be answered is whether Baker was a partially disabled employee at the time he refused to return to work. We conclude he was not partially disabled at that time. Baker returned to work on March 1, 1983, after his doctor had released him to work without any limitations. At that time, Baker's doctor was of the opinion that Baker did not have any permanent disability. Further, Baker had been working for approximately three months before the strike was called. *As Baker was not a partially disabled employee when he lost his job, I.C. § 72-403 does not apply.*" (Emphasis added.)

Louisiana-Pacific Corporation attempts to "twist" the Supreme Court's determination by saying that the Court ruled in accordance with Louisiana-Pacific's contentions. As can be seen from a complete reading of the paragraph, the Court did not reach the issue of whether Idaho Code § 72-403 applies to workers who have sustained a *Permanent* partial disability. Reaching the Defendant Louisiana-Pacific Corporation's conclusion is an extreme interpretation of the Court's language. It also ignores Justice Bistline' s dissent in *Gomez v. Rangen's, Inc.*, 105 Idaho at 344-346. The more appropriate interpretation is that this Court found Idaho Code § 72-403 inapplicable.

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II. " . . . that lowly form of life aptly known as a 'scab' laborer." should not be stricken.

Louisiana-Pacific argues that footnote 1 on page 6 of the Court's Opinion should be stricken.

Again, the comments of the author of the opinion must be taken in context, which was not done by Louisiana-Pacific Corporation.

Justice Bistline was of the opinion that Louisiana-Pacific did not offer Burton Baker, a "suitable job" within the meaning of the statute (Idaho Code § 72-403) because the job offer was contingent on Burton Baker becoming a "scab" laborer. Thus, a logical interpretation of the language is that an individual need not become a scab laborer in order to obtain worker's compensation benefits. Justice Bistline stated succinctly the view held by many people in Bonners Ferry, Idaho, in 1983 about scab laborers. If Burton Baker had crossed the picket line and had become a "scab" he would have been subjected to ridicule, loss of friendships, and loss of pride. As set forth in *Funk v. Wagnall's Standard Dictionary,* International Edition, 1960, a "scab" is defined to be "A mean, paltry fellow. A workman who does not belong to or will not join or act with a labor union; one who takes the place of a striker; a strike breaker."

Black's Law Dictionary defines a "scab" as a:

> "person who works for lower wages than or under conditions contrary to those prescribed by a trade union; also one who takes the place of a working man on a strike. Non-union workers who pass through a union picket line. A worker who works under non-union conditions."

Appendix N

Justice Bistline correctly stated that "suitable work" for Burton Baker should not include relegating Mr. Baker to the position of a "scab." Justice Bistline's comments accurately state the truth. There is little or no respect in small communities for workers who betray their fellow union workers by crossing a picket line.

III. Attorney's Fees are Properly Awardable.

Defendant Louisiana-Pacific Corporation states in a self serving manner that it did not appeal "without reasonable grounds." A review of the arguments made on appeal demonstrate that Louisiana-Pacific Corporation simply asked the Supreme Court to substitute its view of the facts for that of the fact finder, the Industrial Commission.

Defendant-Appellant Louisiana-Pacific Corporation attempts to "boot-strap" its argument by saying it appealed a "significant issue of law." Defendant-Appellant Louisiana-Pacific Corporation attempts to argue that Idaho Code § 72-403 was applicable when, as a matter of law, it had no applicability under the facts of this case. This was not a "first impression" case; there was no interpretation of Idaho Code § 72-403.

The awarding of attorney's fees in this case serves as a deterrent to other self-insured corporations and insurance companies. An award of attorney's fees tells insurance companies they should not delay payment of benefits by engaging in unreasonable appeals. Of note is the fact that Defendant Louisiana Pacific Corporation continues to refuse to pay even the uncontested impairment or disability. Pursuant to Idaho Code § 72-804, Defendant Louisiana-Pacific Corporation continues to act unreasonably under these circumstances. (See Affidavit of Verby.)

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IV. Defendant Louisiana-Pacific's Motion to Disqualify Justice Bistline is Inappropriate.

A close examination of Defendant Louisiana-Pacific Corporation's Motion to Disqualify Justice Bistline, its aff in support of disqualification, and its brief in support of its motion for disqualification leaves one with the abiding belief that the Defendant simply has a "sour grapes" attitude towards the decision maker. There has been no showing of bias or prejudice by Justice Bistline or any of the members of the Supreme Court in the decision reached. There is no showing that Justice Bistline acted inappropriately. (See Affidavits of Steve Verby and Burton Baker contradicting Defendant's implication of impropriety.)

The Idaho Supreme Court is presented with no cognizable facts germane to the issue of Justice Bistline's disqualification. Defendant Louisiana-Pacific Corporation does present "argument" in its affidavit on legal issues. There exists no fact upon which to base Louisiana-Pacific Corporation's conclusion that Justice Bistline was "prejudiced" and therefore did not receive due process during the course of this appeal.

CONCLUSION

This Court should not grant rehearing. Because the Court has already ruled that Defendant Louisiana-Pacific Corporation's arguments regarding the existence of impairment and the extent of Baker's disability were nothing but efforts to have this Court reweigh evidence on appeal, this Court should not revisit the issue. In addition, this Court found that Louisiana-Pacific's contention that Idaho Code § 72-403 prevented recovery by Burton Baker was "utterly without merit . . .".

Appendix N

This Court's determination that an award of attorney's fees to Baker on appeal is appropriate. The decision on attorney's fees is correct because Louisiana-Pacific appealed the claim for compensation without reasonable grounds.

Since Defendant Louisiana-Pacific Corporation presented no facts demonstrating bias, the Defendant's motion to disqualify Justice Bistline should be denied.

DATED this 12th day of April, 1993

s/ Steve Verby
STEVE VERBY
Attorney for Claimant-
Respondent

I hereby certify that a true and correct copy of the foregoing was mailed by regular mail, proper postage affixed on this 12th day of April, 1993:

Starr Kelso
Attorney at Law
P. O. Box 2127
Coeur d'Alene, ID 83814
s/ Debra Courtney

APPENDIX O — AFFIDAVIT OF STEVE VERBY DATED APRIL 12, 1993

VERBY LAW OFFICE
STEVE VERBY
Attorney at Law
113 North Second Avenue
P.O. Box 1005
Sandpoint, ID 83864

IN THE SUPREME COURT OF THE STATE OF IDAHO

SUPREME COURT DOCKET NO. 19430

BURTON BAKER,

Claimant/Respondent,

vs.

LOUISIANA-PACIFIC CORPORATION,

Defendant/Appellant.

AFFIDAVIT OF STEVE VERBY

STATE OF IDAHO)
)ss
County of Bonner)

Steve Verby, after being first duly sworn on oath, deposes and states as follows:

1. I am the attorney for Burton Baker, the Claimant-Respondent in this case where Starr Kelso seeks to have Justice Bistline disqualified.

Appendix O

2. One of the reasons utilized by Starr Kelso to request disqualification of Justice Bistline is that he observed Justice Bistline conversing with Burton Baker in the courtroom after oral argument. The implication made by Starr Kelso is that Justice Bistline was acting in an unethical manner. That implication is wrong. After oral argument, Justice Bistline was leaving the courtroom. As Justice Bistline was leaving I said hello and a short conversation occurred. Since Mr. Baker had accompanied me to oral argument, I introduced Justice Bistline to Burton Baker. The typical conversational courtesies such as "how are you" were engaged in by Justice Bistline and me. None of the facts of the case, none of the points addressed in the argument, or any other aspect of Burton Baker's case was discussed with Justice Bistline.

3. As of today's date, Defendant Louisiana-Pacific Corporation has continued to refuse to make any payment to its injured worker Burton Baker. Louisiana-Pacific Corporation continues to refuse to pay Burton Baker the uncontested amount of impairment determined to exist by its hired physician, Dr. Sears. Defendant Louisiana-Pacific Corporation has never paid Burton Baker any benefits for Mr. Baker's permanent injury.

DATED this 12th day of April, 1993.

s/ Steve Verby
STEVE VERBY

SUBSCRIBED AND SWORN to before me on this 12th day of April, 1993.

s/ Debra G. Courtney
Notary Public in and for Idaho
Residing at: Hope

Appendix O

Commission expires: 11-23-94

I hereby certify that a true and correct copy of the foregoing was mailed by regular mail, proper postage affixed on this 12th day of April, 1993, to:

Starr Kelso
Attorney at Law
P.O. Box 2127
Coeur d'Alene, ID 83814

s/ Debra Courtney

APPENDIX P — AFFIDAVIT OF BURTON BAKER DATED APRIL 8, 1993

VERBY LAW OFFICE
STEVE VERBY
Attorney at Law
113 North Second Avenue
P. O. Box 1005
Sandpoint, ID 83864

IN THE SUPREME COURT OF THE STATE OF IDAHO

SUPREME COURT DOCKET NO. 19430

BURTON BAKER,

Claimant/Respondent,

vs.

LOUISIANA-PACIFIC CORPORATION,

Defendant/Appellant.

AFFIDAVIT OF BURTON BAKER

STATE OF IDAHO)
) ss.
County of Bonner)

Burton Baker, after being first duly sworn on oath, deposes and states as follows:

Appendix P

1. I am the Claimant-Respondent in this case that is presently before the Idaho Supreme Court.

2. I have read the affidavit signed by Starr Kelso, the defense attorney for Louisiana-Pacific, which was dated March 30, 1993.

3. I have also read Louisiana-Pacific's Brief in Support of Petition for Rehearing, Louisiana-Pacific's Corporation's Petition for Rehearing, and Louisiana-Pacific's Brief in Support of its Motion to have Justice Bistline Disqualified.

4. It appears to me that Mr. Kelso implies that Justice Bistline acted in some improper way after the oral argument took place in Coeur d'Alene, Idaho. That is not correct.

5. I had not met Justice Bistline before this case was submitted to the Industrial Commission. Justice Bistline and I never had any type of attorney/client relationship. I did not know Justice Bistline and I had never been introduced to him before this case was submitted to the Supreme Court.

6. After the attorneys presented their argument in Coeur d'Alene, Idaho, my lawyer, Steve Verby, was packing up his papers he used in the argument. Justice Bistline was walking by the table where Steve Verby had his papers. Steve Verby and Justice Bistline each exchanged greetings and talked to each other. Justice Bistline, acting as a normal, courteous, human being, said hello and asked how I was doing since I was standing next to Steve Verby. This was the type of "small talk" that typically occurs in our society. This case was not discussed.

7. Neither Steve Verby nor Justice Bistline discussed my case, the arguments, or anything having to do with the position taken by Starr Kelso or by my attorney.

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8. In my opinion, the extremely short conversation Justice Bistline had with me was nothing other than exchanging pleasantries as he was walking out of the courtroom.

DATED this 8 day of April, 1993.

s/ Burton Baker
BURTON BAKER

SUBSCRIBED AND SWORN to before me on this 8th day of April, 1993.

s/ Debra G. Courtney
Notary Public in and for Idaho
Residing at: Hope
Commission expires: 11-23-94

I hereby certify that a true and correct copy of the foregoing was mailed by regular mail, proper postage affixed on this 12th day of April, 1993, to:

Starr Kelso
Attorney at Law
P. O. Box 2127
Coeur d'Alene, ID 83814
s/ Debra G. Courtney

APPENDIX Q — MOTION TO STRIKE BURTON BAKER'S BRIEF AND AFFIDAVITS IN OPPOSITION TO PETITION FOR REHEARING AND IN OPPOSITION TO DISQUALIFY JUSTICE BISTLINE DATED APRIL 15, 1993

IN THE SUPREME COURT OF THE STATE OF IDAHO

S. Ct. No. 19430

BURTON BAKER,

Claimant-Respondent,

vs.

LOUISIANA-PACIFIC CORPORATION, Employer,

Defendant-Appellant.

MOTION TO STRIKE BURTON BAKER'S BRIEF AND AFFIDAVITS IN OPPOSITION TO PETITION FOR REHEARING AND IN OPPOSITION TO PETITION FOR REHEARING AND IN OPPOSITION TO DISQUALIFY JUSTICE BISTLINE

COMES NOW the above-named Appellant/Petitioner for Rehearing Louisiana-Pacific Corporation, by and through its attorney of record, Starr Kelso, and hereby respectfully moves this Court for an order pursuant to Rule 42 of the Idaho Rules of Appellate Rules striking the brief of Burton Baker in opposition to petition for rehearing and in opposition to motion to disqualify Justice Bistline and the affidavits of Burton Baker and Steve

Appendix Q

Verby. The basis of this motion is that Pursuant to Rule 42, no response to any petition for rehearing shall be made except upon direction of the Court. Appellant/Petitioner for Rehearing is unaware of any order of this Court directing a response to be filed by Burton Baker.

Further, relative to the response to the motion for Justice Bistline to recuse himself, counsel for Appellant/Petitioner for Rehearing is unaware of any provision for filing of argument on a motion to recuse let alone filing of affidavits. The issue is not one for the adversarial arena, but rather one that goes to the issue of the "appearance of justice."

DATED this 15 day of April, 1993.

SIMS, LIESCHE, NEWELL, KELSO,
WALLACE & WALLACE, P.A.
s/ Starr Kelso

CERTIFICATE OF SERVICE

This is to certify that on this 15 day of April, 1993, the undersigned served at true and correct copy of the foregoing upon the following individuals by depositing a true and correct copy of the same in the United States mails, postpaid, and addressed as follows:

STEVEN C. VERBY
Attorney at Law
PO Box 1005
Sandpoint, Idaho 83864

BY: s/ Starr Kelso

APPENDIX R — MOTION TO VACATE ORDER AWARDING COSTS AND ATTORNEY'S FEES DATED APRIL 15, 1993

IN THE SUPREME COURT OF THE STATE OF IDAHO

S. Ct. No. 19430

BURTON BAKER,

Claimant-Respondent,

vs.

LOUISIANA-PACIFIC CORPORATION, Employer,

Defendant-Appellant.

MOTION TO VACATE ORDER AWARDING COSTS AND ATTORNEY FEES

COMES NOW the above-named Appellant/Petitioner for Rehearing, Louisiana-Pacific Corporation, by and through its attorney of record, Starr Kelso, and hereby respectfully moves this Court for an order vacating the Order Awarding Costs and Attorneys Fees dated the 23rd day of April, 1993.

The basis for this motion is that this order is premature and an objection was filed which is currently pendlng with the Supreme Court.

DATED this 27 day of April, 1993.

Appendix R

SIMS, LIESCHE, NEWELL, KELSO,
WALLACE & WALLACE, P.A.
s/ Starr Kelso

CERTIFICATE OF SERVICE

This is to certify that on this 27th day of April, 1993, the undersigned served at true and correct copy of the foregoing upon the following individuals by depositing a true and correct copy of the same in the United States mails, postpaid, and addressed as follows:

STEVEN C. VERBY
Attorney at Law
PO Box 1005
Sandpoint, Idaho 83864

BY: s/ Mary A. Salise

APPENDIX S — DECISION IN *GOMEZ v. RANGEN'S INC., ET AL.*, DATED MAY 16, 1983

Francisco R. Gomez,

Claimant-respondent,

v.

RANGEN'S INC., Employer, and Argonaut Northwest Insurance Company, Surety,

Defendants-appellants.

No. 14248.

Supreme Court of Idaho.

May 16, 1983.

Rehearing Denied Oct. 4, 1983.

* * *

BAKES, Justice.

On June 7, 1979, Francisco Gomez, the claimant respondent, received an injury to his back in the course and scope of his employment with Rangen's, Inc. At the time of the accident, Rangen's, Inc., was insured by Argonaut Northwest Insurance Co., the defendant appellant in this action. Dr. Vern H. Anderson of Buhl initially examined claimant, found him to be disabled from work and referred him to Dr. Robert J. Porter, an orthopedic surgeon in Twin Falls, Idaho. Dr. Porter examined claimant on

June 27, 1979, and periodically over the course of the next ten months and prescribed treatment, including medication, physical therapy, and injections.

Claimant's condition did not significantly change or improve during the course of treatment. Dr. Porter was unable to find any objective cause for claimant's complaint, but nevertheless rated claimant's physical injury as a permanent partial physical impairment equal to 10% of the whole man, based solely upon claimant's subjective complaints of pain in his back.

Claimant filed a claim for workmen's compensation benefits on June 30, 1979. At the hearing before the Industrial Commission on August 5, 1980, various witnesses testified, and the parties stipulated to the admission of certain medical reports. A counselor for the rehabilitation division of the Industrial Commission, Mr. Jim Spooner, testified concerning his efforts to obtain employment for claimant. He testified that in early 1980 he had contacted Rangen's, Inc., which made an offer to re-employ claimant, and that Dr. Porter had given claimant a work release to perform the duties described in Rangen's offer of employment. The job consisted of custodial duties and minor maintenance, and Mr. Spooner stated that other "large operations" in the area would have had similar employment opportunities that were compatible with claimant's physical restrictions. Mr. Spooner further testified that he had discussed the job offer and the nature of the work with claimant, who refused the job offer, stating that "he was too disabled to do that type of work."

At the conclusion of the hearing, Rangen's attorney made a motion to amend the pleadings to conform to the evidence, asserting as a defense that claimant had refused suitable work and that he therefore had forfeited his right to workmen's

compensation benefits. Claimant's counsel made no objection to the motion. The commission made no ruling upon the motion at that time.

Pursuant to stipulation, a medical panel in Boise, Idaho, examined the claimant in July, 1980, and reported its findings to the Industrial Commission. The panel found no objective evidence indicating the source of claimant's pain and gave no rating of permanent partial physical impairment. The psychiatrist on the panel, however, concluded that claimant suffered a psycho-neurotic depressive reaction from the injury and the panel gave him a rating of 5% impairment of the whole man on that basis.

After all medical reports and the parties' briefs had been submitted, the Industrial Commission issued its decision in its Findings of Fact, Conclusions of Law, and Award, filed on April 2, 1981. The commission found, among other things, that Rangen had offered claimant a job that was compatible with the work restrictions on heavy lifting described by Dr. Porter; that the job was considered light work consisting of custodial duties and minor maintenance, at a salary that was just a few cents an hour less than he was previously receiving; that claimant was able to perform the job of custodian offered to him by Rangen's, or other similarly light work; and that claimant was not totally and permanently disabled.

In determining the extent of claimant's disability the commission accepted Dr. Porter's physical and partial permanent impairment rating of 10% of the whole man, and the 5% impairment rating resulting from the psycho-neurotic depressive reaction. The commission also found that non-medical factors, such as age, limited education and work experience, constituted an additional impairment of 10% of the whole man.

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The commission awarded claimant total temporary disability benefits for the period from June 9, 1979, to April 14, 1980, with credit for the amounts previously paid. In addition to the total temporary benefits awarded, the commission concluded that claimant suffered a permanent partial disability of 25%, as compared to the whole man, and awarded him income benefits at the statutory rate for permanent partial disability for a period of 125 weeks. Rangen appeals from the award. For the reasons set forth below, we reverse and remand the cause to the Industrial Commission.

The findings of fact entered by the Industrial Commission that specifically relate to claimant's impairment and disability and his capacity to perform available work, including the work offered to him by Rangen's, Inc., are as follows:

"V

> "Dr. Porter has rated the claimant's permanent partial impairment as 10% of a whole man, due to unrelenting back pain aggravated by activity. The claimant is unable to return to any type of heavy lifting, in the opinion of Dr. Porter. The rating is based upon subjective complaints by the claimant. The claimant thereafter received a job offer from Rangen's, which was compatible with the claimant's work restrictions. The job was evaluated by a rehabilitation counselor of the Industrial Commission. The work was as a custodian, doing clean up and minor maintenance. The job is considered to be light work. The pay was only a few cents an hour less that the job the

claimant was doing at the time of the injury. The job description was reviewed and approved by Dr. Porter and the job is within the restrictions placed on the claimant by Dr. Porter. However, the claimant declined to even attempt to perform the job. The claimant has not attempted to obtain or try any employment and has not worked since his accident. The commission finds that the claimant's condition became stable and fixed as of April 15, 1980, the date he was last examined by Dr. Porter.

"VI

"In July 1980, the claimant was examined by a medical panel in Boise consisting of a neurologist, an internist, a psychiatrist, and an orthopedist. The panel found that the claimant had many subjective complaints of pain for which there was no objective evidence during the physical examination. The panel found that the claimant had no evidence of significant physical limitation, and therefore gave him no rating for permanent partial impairment from a physical standpoint. The psychiatrist member of the panel believed that the claimant had a mild degree of depression, as a result of the injury, but that he did not need therapy for this problem. He estimated that the claimant had a 5% impairment of the whole man, on the basis of a psychoneurotic depressive reaction as a result of the claimant's injury. The opinion of the panel, therefore, was that the claimant had a 5% whole man impairment on the basis of psychoneurotic reaction.

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"VII

"The Commission concludes that the claimant's impairment attributable to physical reasons can best be evaluated by Dr. Porter, who was the claimant's treating physician and saw the claimant a number of times over a period of months. The Commission therefore accepts the impairment rating of Dr. Porter and finds that the claimant has a permanent physical impairment of 10% of the whole man from a physical standpoint. The Commission also finds that the claimant has an additional 5% of the whole man physical impairment on the basis of a psycho-neurotic depressive reaction.

"VIII

"A counselor with the Idaho Department of Employment testified on behalf of the claimant. He did not attempt to place the claimant in employment because the claimant expressed the opinion, to the counselor, that he was not able to work at all. It was the counselor's opinion that the claimant's age, limited education, and work experience significantly reduce the claimant's ability to obtain and hold a job in the Twin Falls area. The Commission finds that the non-medical factors attributable to the claimant constitute a 10% of the whole man impairment, in addition to the physical and mental impairments established

> by the medical doctors. The Commission finds that the claimant is not totally disabled as he contends. The claimant is able to perform the job of custodian offered him by Rangen's, or other similar light work. The Commission further finds that the claimant's physical impairment, as determined by Dr. Porter, the claimant's mental impairment, as evaluated by the psychiatrist, and the claimant's disability attributable to non-medical factors, in summation, constitute a total of permanent partial disability of 25% of the whole man, which is attributable to the effects of the claimant's injury of June 7, 1979."

Appellant relies on I.C. § 72-403 in support of its argument that, by refusing to accept the custodial position offered to him by Rangen's, Inc., a position that the Industrial Commission specifically found claimant capable of performing, claimant forfeited his right to recover any workman's compensation benefits. I.C. § 72-403 provides:

> "72-403. PENALTY FOR MALINGERING — DENIAL OF COMPENSATION. — If a partially disabled employee refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or secured for him, he shall not be entitled to any compensation."

The legislature enacted I.C. § 72-403 in 1971. *See* 1971 Idaho Sess. Laws ch. 124, § 8. Neither party, however, was able to cite, nor does our research disclose, any reported case in which I.C. § 72-

403 has been interpreted or applied. The Industrial Commission failed to address the applicability of I.C. § 72-403 in its findings of fact, conclusions of law, and award. In its motion for reconsideration and supporting brief, appellant urged that I.C. § 72-403 precluded respondent's recovery of any worker's compensation benefits, and respondent argued to the contrary in his responding memorandum. The Industrial Commission summarily denied appellant's motion for reconsideration without addressing the applicability of I.C. § 72-403 to respondent's claim for benefits. Having been fully confronted with the issue of whether I.C. § 72-403 applied to bar claimant's recovery of benefits, "it would appear that the Commission failed to fully consider its obligation to make specific findings and conclusions in this regard, and thus, this case must be remanded to the Commission to afford it the opportunity to again examine its position . . ." *Sines v. Appel,* 103 Idaho 9, 13, 644 P.2d 331, 335 (1982) (action remanded for determination of "manifest injustice" as a ground for reopening and review of an order of the commission); *see Clayton v. Hercules Mining Co.,* 63 Idaho 301, 119 P.2d 890 (1941); *Dyre v. Kloepfer,* 64 Idaho 612, 134 P.2d 610 (1943).

Since the commission should have passed on this issue before it is considered by this Court, the order of the Industrial Commission is reversed and the cause remanded for findings of fact and conclusions of law on the issue of whether I.C. § 72-403 bars respondent's claim to benefits.

Costs to appellant.

DONALDSON, C.J., and SHEPARD and HUNTLEY, JJ., concur.

HUNTLEY, Justice, specially concurring.

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I concur in the reversal and remand for the reasons stated in the majority opinion. However, since the record before us is complete for framing the ultimate legal issue, I would take it one step further and offer guidance to the Commission in performance of its task of interpreting, and reconciling the applicable section of the Workmen's Compensation statutes.

It would make no sense to rule that a worker forfeits permanent partial disability entitlement (say for the loss of an arm or a leg or other disability) because of refusal to work for whatever reason — rather, a reading of the code as a whole drives the conclusion that the legislature intended I.C. § 72-403 to apply only to temporary total benefits.

BISTLINE, Justice, dissenting.

It will not surprise the trial bar that the author of today's majority opinion was the sole lamenting dissenter in *Sines v. Appel*, 103 Idaho 9, 644 P.2d 331 (1982), but the bar may well be startled to see three other members so readily joining the opinion. It may neither surprise nor startle anyone that the majority are unmindful of our recent *Houser* case[1] where this same Supreme Court experienced no trouble in simply *assuming* that the same Commission properly applied a statute where the record was absolutely devoid of any indication that it had been considered — which was painstakingly pointed out in my own opinion in that case. The record in this case is not similarly devoid, however, and the majority's opinion is somewhat lacking in accuracy wherein it declares to the unsuspecting reading public that the Commission summarily denied Argonaut's motion for reconsideration. Quite

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1. *Houser v. Southern Idaho Pipe & Steel, Inc.*, 103 Idaho 441, 649 P.2d 1197 (1982). *See* dissent, 103 Idaho at 449, 649 P.2d at 1207 (right column).

the contrary is the truth of the matter. In my experiences I have encountered summary dispositions, and in my present position I have observed many. A two week consideration of a motion before ruling upon it is not, in my book at least, a summary disposition. More than that, however, I have always understood that where a clear-cut issue of *law* can only be decided one way or the other, the determination will necessarily be for one party or the other. Fifty times a year, give or take a few, this Court receives petitions for rehearing from our own decisions and from decisions of the Court of Appeals. Ninety to ninety-five percent of those petitions are ruled upon by a single word — "Denied." In some instances the single word is "Granted" — and in no instance does the Court deign to explain its reasoning — often in the face of exceptionally well written and compelling petitions. Those who want to fathom the Court's ratio decidendi, if there is one, must glean it from reading the petition and measuring the value of the Court's opinion against the content of the petition. Such is often true where the Court on appeal reviews an order sustaining a motion to dismiss, and order granting or denying a motion for a new trial, and an order granting a summary judgment.

Today the majority tosses into the wheels of the administration a monkey wrench — one which reverses the process, notwithstanding that the only issue is one of law, and which this Court will ultimately decide one day. Why not now? See my separate opinions in the recent cases of *Comegys*[2] and *Grant*.[3]

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2. *Comegys v. Idaho Air National Guard*, 83 I.S.C.R. 261 (S.Ct. No. 14048, 1983 Opinion No. 25 filed February 15, 1983) (petition for rehearing pending).

3. *Grant v. Brownfield's Orthopedic & Prosthetic*, 83 I.S.C.R. 295 (S.Ct. No. 13780, 1983 Opinion No. 28 filed February 17, 1983) (petition for rehearing granted; rehearing on oral argument pending).

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Is it necessary that this Court know the reasoning processes by which the Commission concluded that Argonaut's motion was not well taken? I think not. Not for one moment is it to be expected that the five legal minds on the Supreme Court will subvert their own judgment of the law, as they think the law should be, to a commission of three, only one of whom is certified as being learned in the law — not forgetting the other two have nothing to guide them but wisdom, experience, and integrity.

The issue presented to the Commission was indeed novel — so novel in fact that so far as is known, no other surety or employer has heretofore ever advanced it. It is not a difficult issue. Even the majority opinion, as presently written, acknowledges that if Mr. Gomez continued in employment that it would have to be at a job, such as was offered which "was compatible with the work restrictions on heavy lifting described by Dr. Porter; that the job was considered light work consisting of custodial duties and minor maintenance" — which in ordinary parlance translates into janitor, watchman, or both. The same thing would as readily be so if Gomez had been fitted with two artificial hip joints, or had he lost three fingers from one hand, or perhaps suffered a frozen shoulder or elbow joint. *The Commission here concluded that Gomez by reason of an industrial accident in covered employment had a 25% impairment.* That impairment is not challenged on this appeal. It is sneered at by Argonaut, and lampooned in the majority opinion, but it has not been challenged. Notwithstanding that the only issue on the appeal is Argonaut's claim hat Gomez has forfeited away the award which the Commission — not as a gratuity or as a beneficence — in its application of the legislature's law says is due a working man who in his employment is by industrial injury deprived of some of his bodily members or bodily functions. Make no mistake about it. That is what is involved here. What is not involved is the weekly compensation a man is entitled to following

injury up until the time he can return to work, fully, or part-time. To urge that a man who either believes he can no longer work or even cares to no longer work gives up, by way of forfeiture, the outright loss of a leg, or the full use of a sturdy back which has well served him for approximately sixty years, is such a monstrous proposition that little wonder it has not been heretofore urged. If, while drawing temporary benefits following injury, a worker turns down suitable employment, such is a different matter, and I would be among the first to say, "No work, no pay." I will not be among the last to say that a working man can be lawfully held to have forfeited away that little which the law says shall be his when on the job he loses a hand or an eye, or from back injury has "unrelenting back pain aggravated by activity." Commissions Finding of Fact V, based on accepted testimony of attending physician. I will not be the last because I will *never* succumb to such an absurdity, perhaps to some extent because of growing up steeped in notions of Idaho opinions which have always held forfeitures in disfavor. Here, the proposition before the Court being that we should forfeit away that which the law (through the Commission) gives Mr. Gomez for his bodily impairment and resultant disability, I very much question the constitutionality of the construction of a statute in that manner. We ought not forget that the working man, ere the advent of the Workmen's Compensation Act, was not disabled from suing his employer for his injuries suffered on the job. Some suits he would win; more he would lose; but ever he had the right to make the try, even though the odds against him were fearful. An enlightened legislature took that right away, and for his disability gave him the "sure and certain relief" which has been the promise of the law. I little doubt that those who would now forfeit away the gold which he is paid for a lost arm, an eye, or a bad back, would also claim the right to have forfeited away a personal injury damage award recovered before the Act by a man who believed he could no longer do gainful work, or, perhaps did not care to do so, especially when

the offer came from the very employer against whom he was claiming, and there was no reason to believe other than that the job of custodian might be abolished once settlement was made. Under the circumstances of this case, many may see the majority opinion as being a bit on the gullible side. Even so, no matter which way the ball may eventually bounce, there is no reason to procrastinate, and no logic in demanding of the Commission that it detail its reasoning in finding Argonaut's motion without merit. If the majority are of a disposition to wreak a forfeiture upon Mr. Gomez, it is suspected that he would prefer now as well as later. Equally, there is no reason for a majority opinion which as I read it seems to intimate that the Commission should not have found impairment and awarded disability on the subjective complaints the claimant made to his doctor, and his therapist, and a rehabilitation worker all of whom treated claimant for the physical problems he had. The majority's portrayal of the nature of the evidence which satisfied the Commission had nothing whatever to do with the single issue presented on appeal. That single issue was equally well presented to the Commission by both Argonaut and Mr. Gomez — so well indeed that it is difficult to comprehend the Commission's denial of Argonaut's motion as being said to have been summarily rendered.

The brief which Argonaut submitted to the Commission went directly to the heart of its contention, and I deem it appropriate to lay out salient portions of it in order to dispel any thought that the Commission ruled summarily, off the top of its head, and without hearing and considering the arguments and authority of counsel for the parties. Prefatorily, however, I emphasize that the Commission did not award any temporary benefits after the time that Dr. Porter certified that his treatment of Mr. Gomez was concluded and he could return to light work. At stake here is Argonaut's contention that Mr. Gomez should be stripped of the award for his permanent

disability. So positioned, I extract the salient passages from Argonaut's brief laid before the Commission:

> "Defendants submit that the Commission has totally failed to apply or consider the provisions of Section 72-403, Idaho Code. That section specifically provides 'if a partially disabled employee refuses to seek suitable work or refuses . . . to work after suitable work is offered to . . . or secured for him, he shall not be entitled to any compensation.'
>
> "The foregoing statute is unambiguous. We have no particular argument with the Commission's findings insofar as it applies to this issue . . .
>
> . . . .
>
> ". . . Simply stated, was are confronted now with a case where a claimant has no objective medical findings (Dr. Porter testified that if he were to rate him on objective medical findings, the rating would be zero). (Dr. Porter's deposition, page 12, line 20-25) The Commission acknowledges by its findings that the claimant is able to perform janitorial or custodial work of the nature offered by the employer and is able to perform similar type work to that offered him. That the doctor released the claimant for that type of work, the work having been totally evaluated by what we assumed to be a competent and qualified

Rehabilitation Counselor (one employed by the Industrial Commission). The claimant not only had failed to establish that he could not subjectively perform the work, however, it is found without conflict, that the claimant won't even attempt it.

"On the basis of the foregoing the Commission rules that the claimant is entitled to some $13,500.

"Section 72-403, Idaho Code, specifically provides that where a partially disabled employee refuses to work after suitable work is offered to him shall *'not be entitled to any compensation.'*

"In this case he was released for the work, the work was obtained for him, the employer offered it to him and he refused it. The decision in this case clearly should be in conformance with the application of the statute cited. The claimant should 'not be entitled to any compensation.' There is simply no justification in failing to apply this statutory provision.

SUMMARY

"Since the Supreme Court of the State of Idaho has adopted the 'odd lot doctrine' it has become fashionable for employees with back sprains and no objective medical findings to seek an impairment rating based upon

subjective complaints. The next step is to then establish through a counselor, taking into consideration the subjective complaints, that the claimant now has a 'disability rating' of something in the neighborhood of 50 - 60% as compared to the whole man. In this case the claimant went a little farther contending that he was totally and permanently disabled with this back sprain even though no doctor, including his own doctor, could find anything wrong with him to substantiate these subjective complaints.

"Unlike most of these cases which come before the Commission, the defendant came forth with the testimony of the Industrial Commission Rehabilitation Counselor who in this case was able to do his job. He worked with the employer and he worked with the claimant's doctor. He found out from the doctor the restrictions that were placed upon the claimant and was able to find work within those restrictions which the doctor recommended the claimant get into. Had the claimant followed his doctor's advice and cooperated with the Rehabilitation Counselor, the claimant's permanent disability would have been little or nothing.

"However, in order to avoid such an inhumane result, the claimant simply refused to even attempt to do the work. By proceeding in that fashion, the claimant has now received

> from the Commission the decision giving him some $13,500. In other words, 25% as compared to the whole man. All of this is done even in face of Section 72-403, Idaho Code, which specifically provides that where suitable work is offered and the claimant refuses it, he shall receive no compensation.
>
> "It is difficult to understand a system which places a premium on a claimant who, without any objective medical findings, can simply refuse to accept employment offered to him through the very system which is being supported by the workmen's compensation system and work which his own doctor has cleared through the vocational counselor.
>
> "Such a result is not only undesirable, it is absolutely unwarranted."

R. pp. 59-62.

It is thus to be noted that Argonaut, while initially conceding no fault with the findings of the Commission, and while contending that the statute forfeits away a claimant's disability award where the claimant declines to take or try light work, nevertheless, is essentially arguing against the award, the essence of which is the unique proposition that "Had the claimant followed his doctor's advice and cooperated with the Rehabilitation Counselor, the claimant's permanent disability would have been little or nothing." Exactly how this would have cured the permanent disability to the back is not further explained or suggested.

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The brief submitted by Mr. Gomez supplied the Commission with a resume of the statutory law and Supreme Court decisions:

> "Defendant in this Motion for Reconsideration cites Idaho Code 72-403 and contends that based upon this statute, Mr. Gomez, although he has sustained permanent physical impairment and disability as a result of his industrial accident of June 7th, 1979, is not entitled to any compensation whatsoever. The statute cited by the Defendant was enacted by the Idaho State Legislature in 1917 and the language thereof has never been modified.
>
> "Both prior and subsequent to the 1971 recodification of the Idaho Workmen's Compensation Law, weekly compensation benefits were and are available at a reduced rate for a partially disabled claimant. Idaho Code § 72-408 provides as follows:
>
> > " 'Income benefits for both total and partial disability during the period of recovery shall be paid to the disabled employee subject to deduction on account of a waiting period and subject to the maximum-minimum limit set forth in Section 72-409 as follows:
> >
> > * * * *
> >
> > (3) Partial disability. For partial disability during the period of recovery

> an amount equal to sixty per cent (60%) of his decrease in wage-earning capacity.'

Under the old code, I.C.A. 43-1112, the statute provided:

> " 'Where the injury causes partial disability for work, the employer, during such disability and for a period not exceeding 150 weeks, shall pay the injured workman a weekly compensation equal to fifty-five per cent of the difference between his average weekly wages before the accident and the weekly wages he is able to earn thereafter . . .' "

I find no Idaho cases interpreting Idaho Code 43-1112, now I.C. § 72-403 but it appears clear that such statute had no application to benefits provided under I.C.A. 43-1113 — the statute which set forth compensation rates and benefits for scheduled losses of the human anatomy. In *Peterson's Estate vs. J.R. Simplot Company,* et al., 83 Idaho 120, 358 P.2d [587] 1961, the Idaho State Supreme Court held:

> " 'that specific indemnity for permanent injury less than total must be paid without limitation or condition "in addition to all other compensation".'

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"Further, the Idaho State Supreme Court, in the same case, ruled that a specific indemnity award was of the nature of a judgment for liquidated damages and the right to enforce payment survived death. The present permanent partial impairment and disability statute, Idaho Code § 72-430 likewise provides that the benefits therein set forth shall be paid in addition to other benefits payable during the period of recovery and likewise provides that said benefits shall not abate or be lost because of death, Idaho Code § 72-431. Thus, it would appear that the clear legislative intent was to continue the availability of permanent partial disability and impairment benefits to an employee injured less than total 'without limitation or condition.'.

"Assuming arguendo that Idaho Code § 72-403 has application to an award of benefits for permanent partial disability and impairment then it must follow that such statute would have application for so long as the Industrial Commission retains jurisdiction of the claim; that is, the Industrial Commission would necessarily retain jurisdiction before and subsequent to the time of an award; and thus, a claimant who had received an award would remain under surety surveillance and his benefits for partial disability and impairment would remain subject to forfeiture at any time the surety was able to establish that the claimant had refused to seek suitable work or

neglected to work after said work was offered to him. The application, therefore, of Idaho Code § 72-403 to an award for permanent disability would affect the finality of said award and would subject the same to motions for modification upon grounds other than those set forth in Idaho Code § 72-719 — which statute limits the Commission in reducing an award for permanent partial disability and impairment for the reasons only of: (a) change in the nature and extent of employee's injury or disablement or; (b) fraud. There is no reference in Idaho Code § 72-719 for forfeiture of benefits because an employee failed or refused or neglected to seek suitable work. Second, application of Idaho Code § 72-403 to benefits for permanent partial disability and impairment would effectuate forfeiture of said benefits for a claimant who had means of support other than his personal labor and elected for a period of time to not re-enter the labor force.

"Therefore, in conclusion, it is respectfully submitted that the decision of the Industrial Commission as it now stands is correct and that Idaho Code § 72-403 has application only to partial disability benefits provided for in Idaho Code § 72-408 Sub-Paragraph 3 and has no application to an award for permanent partial impairment or disability."

R., pp. 65-68.

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A reply brief furnished by Argonaut to the Commission simply returned to the thesis of its first brief:

> "If we understand the reasoning of the claimant, it goes something like this. The claimant is injured and receives temporary total disability benefits. Claimant is rated for permanent physical impairment. Claimant is then screened by the Division of Rehabilitation of the Industrial Commission, who, in coordination with the employer and attending physician, finds work for the claimant. The claimant decides to refuse to attempt to do the work. The permanent physical impairment rating given by the attending physician is 10% as compared to the whole man, however, acknowledging that if based upon objective medical findings, it would be zero. In other words, the rating is not based upon any objective medical findings that are abnormal. There is a psychoneurotic reaction equivalent to the permanent physical impairment of 5% as compared to the whole man. No statement is necessary for the condition. Further specialists examining the claimant find no permanent physical impairment relative to the back injury which is alleged. Under the foregoing circumstances, if the claimant returns to work, it would be at essentially the same wage he was making before the injury. The claimant decides not to return to work and instead, gets $13,500 which is equivalent to a disability of 25% as compared to the whole man.

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> "The foregoing reads something like Alice In Wonderland. Yet, it is not. Rather, it is Gomez under the Idaho Workmen's Compensation Laws of the State of Idaho."

R., p. 71.

It is thus seen that Argonaut's request for an outright forfeiture of the entire award predicated upon the Commission's established impairment rating was simply Argonaut's inordinate dismay at a Commission's award based on subjective complaints, coupled with his former employer's apparent willingness to make a job for Mr. Gomez, at least when and while the claim was pending. Absent the tender of a written contract of employment — of which there is no evidence or intimation — most trial attorneys would be expected to remain somewhat skeptical of a job offer from the very employer whose rate stood to be affected by the outcome of pending litigation. For my part, I see considerable merit indeed in that portion of the Gomez brief which points out that working men are not always impoverished Mexican Nationals, but, on the contrary, often have other and substantial income to the point that they simply decline to push a straw broom when it hurts — or even when it does not hurt. Involuntary servitude has not been a part of The American Scene for a great, great many years.

An afterthought on Catch 22: —

A document entitled Job Analysis, dated April 5, 1980, and prepared on the letterhead of Argonaut Insurance Company shows the job title of "Custodian" with duties of "Cleanup-minor maintenance." This was sent to Dr. Porter and apparently influenced his signing of a certificate that Mr. Gomez could return to light work or school on April 14, 1980 — both of which documents are in the record.

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Mr. Thorleif Rangen, vice President of Rangen's, Inc., testified to his participation in the preparation of the Job Analysis, and stated that he was "willing to rehire Mr. Gomez within the restrictions placed on him by Dr. Porter," adding that Mr. Gomez did not contact him, but also not claiming that he or anyone from his firm contacted Mr. Gomez with a job offer. R., pp. 76-77. Mr. Spooner testified to telling Gomez of an offer at Rangen's consonant with the Job Analysis, but did not intimate or suggest how long the job might last.

It should be remembered that throughout, Mr. Gomez, being advised and represented by counsel, made a serious and sincere effort to establish total and permanent disability. However kind and generous Mr. Rangen's motives may have been in finding a job for Mr. Gomez prior to any hearing before the Commission, it is or should be obvious to even the uninitiated that Mr..Gomez, could not all at the same time accept an offer of employment based upon the Job Analysis (on Argonaut stationery) and successfully go before the Commission on his claim of total and permanent disability. Here was a well thought out Catch 22 presentation if ever there was one. It would be interesting to know if Rangen's, Inc. (on Argonaut stationery) has *since* the entry of the award repeated the job offer. It will be interesting to later learn when this Court eventually reaches and decides the forfeiture issue if Rangen's, Inc. and Argonaut recognize that, assuming arguendo the validity of their contention, forfeitures in Idaho being abhorred, Mr. Gomez should — now that the litigation is over and his out of the Catch 22 box — be given an opportunity to be released from the claim of forfeiture.

APPENDIX T — WEBSTER'S II NEW RIVERSIDE DICTIONARY DEFINITIONS OF "BIGOT" AND "EPITHET"

epithet—"A term used to characterize a person or thing; An abusive word or phrase."

bigot— "One fanatically devoted to one's own group, religion, race or politics and intolerant of those who differ."

APPENDIX U — RELEVANT STATUTES, RULES, CODES AND CONSTITUTIONAL PROVISIONS

UNITED STATES CONSTITUTION, AMENDMENT 14

§ 1. [Citizenship — Due process of law — Equal protection.] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 2. [Representatives — Power to reduce apportionment.] — Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

§ 3. [Disqualification to hold office.] — No person shall be a senator or representative in congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of congress, or as an officer of the United States,

or as a member of any state legislature, or as an executor or judicial officer of any state, to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may by a vote of two-thirds of each house, remove such disability.

§ 4. [Public debt not to be questioned — Debts of the Confederacy and claims not to be paid.] The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

§ 5. [Power to enforce amendment.] — The congress shall have power to enforce, by appropriate legislation, the provisions of this article.

28 U.S.C. § 1257

§ 1257. State courts; appeal; certiorari Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, there is drawn in question the validity of a statute of any state on the

ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

(June 25, 1948, ch. 646, 62 Stat. 929; July 29, 1970, Pub. L. 91-358, title I, § 172(a)(1), 84 Stat. 590.)

IDAHO CONSTITUTION PREAMBLE

PREAMBLE

We, the people of the state of Idaho, grateful to Almighty God for our freedom, to secure its blessings and promote our common welfare do establish this Constitution.

Appendix U

IDAHO CONSTITUTION, ARTICLE I, § 2

Article I, § 2. Political power inherent in the people. — All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform or abolish the same whenever they may deem it necessary; and no special privileges or immunities shall ever be granted that may not be altered, revoked, or repealed by the legislature.

IDAHO CONSTITUTION, ARTICLE I § 18

Article I, § 18. Justice to be freely and speedily administered. Courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property or character, and right and justice shall be administered without sale, denial, delay, or prejudice.

IDAHO CONSTITUTION, ARTICLE V, § 9

Article V, § 9. Original and appellate jurisdiction of Supreme Court. — The Supreme Court shall have jurisdiction to review, upon appeal, any decision of the district courts, or the judges thereof, and any order of the public utilities commission, and any order of the industrial accident board: the legislature may provide conditions of appeal, scope of appeal, and procedure on appeal from orders of the public utilities commission and of the industrial accident board. On appeal from orders of the industrial accident board the court shall be limited to a review of questions of law. The Supreme court shall also have original jurisdiction to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and all writs necessary or proper to the complete exercise of its appellate jurisdiction.

Appendix U

IDAHO CODE § 72-403

72-403. Penalty for malingering — Denial of compensation. — If a partially disabled employee refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or secured for him, he shall not be entitled to any compensation. [I.C., § 72-403, as added by 1971, ch. 124, § 3, p. 422.]

IDAHO CODE § 72-804

§ 72-804. Attorney's fees — Punitive costs in certain cases. — If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission. [I.C. § 72-804, as added by 1971, ch. 124, § 3, p. 422.]

IDAHO APPELLATE RULES

Rule 1. Title, construction and effective date. — These rules shall be known and cited as the "Idaho Appellate Rules" (I.A.R.). These rules shall take effect on July 1, 1977, and thereafter all laws and rules of appellate procedure in the Supreme Court in conflict therewith shall be of no further force or effect. These rules shall govern all proceedings pending in the Supreme Court on the effective date or thereafter commenced, but shall not

control as to the time for filing a notice of appeal if the judgment or order appealed from was entered before July 1, 1977, in which case the time for appeal shall be as provided by law on June 30, 1977. [Adopted March 25, 1977, effective July 1, 1977; amended June 15, 1987, effective November 1, 1987.]

Rule 2. Scope and definitions. — (a) Scope. These rules shall govern all appeals and petitions for special writs or proceedings in the Supreme Court.

(b) Definitions. For purposes of these rules:

(1) "District court" shall include the district courts of all judicial districts but shall not include the magistrates divisions thereof.

(2) "Appellant" shall include "petitioner."

(3) "Respondent" shall mean the adverse party not initially seeking affirmative relief.

(4) "Petition" shall include "complaint" or "application."

(5) "Administrative agency" shall include only the Public Utilities Commission and the Industrial Commission.

(6) "Transcript" shall mean the reporter's transcript.

(7) "Record" shall mean the clerk's or agency's record.

(8) "Clerk" shall mean the clerk of the district court, or the secretary or designated clerk, if any, of the Industrial Commission or the Public Utilities Commission. [Adopted March 25, 1977, effective July 1, 1977.]

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Rule 3. Writs of review, bills of exceptions, and writs of certiorari. — Appellate review by bill of exceptions is hereby abolished. Writs of certiorari or writs of review shall be processed in the same manner as writs of prohibition as provided in these rules. [Adopted March 25, 1977, effective July 1, 1977.]

Rule 4. Persons who may appeal. — Any party aggrieved by an appealable judgment, order or decree, as defined in these rules, of a district court, the Public Utilities Commission or the Industrial Commission may appeal such decision to the Supreme Court as provided in these rules. [Adopted March 25, 1977, effective July 1, 1977.]

Rule 5. Special writs and proceedings. — Any person may apply to the Supreme Court for the issuance of any extraordinary writ or other proceeding over which the Supreme Court has original jurisdiction, and such application shall be made as provided in these rules. [Adopted March 25, 1977, effective July 1, 1977.]

Rule 5. Special writs and proceedings. — Any person may apply to the Supreme Court for the issuance of any extraordinary writ or other proceeding over which the Supreme Court has original jurisdiction, and such application shall be made as provided in these rules. [Adopted March 25, 1977, effective July 1, 1977.]

Rule 6. Title of appeal and designation of parties and size of paper. — The original title of an action or proceeding, with the names of the parties in the same order, shall be retained on appeal by adding the designations of "appellant" and "respondent." In special proceedings the party prosecuting shall be designated the "petitioner" and the adverse party, if any, the "respondent." In an

appeal in which there is no adverse party named in the title, there shall be added the name of the party prosecuting the appeal designated as "appellant." In an appeal from a decision or order of the Idaho Public Utilities commission filed by an intervenor in the original proceedings, the petitioner or applicant in the original proceedings shall be made a party to the appeal, and designated as a "respondent". The district court or administrative agency may by order correct the title of an appeal or cross-appeal at any time before the clerk's or agency's record is lodged as provided in Rule 29. The Supreme Court may amend a title of an appeal or proceeding before it at any time. All motions, petitions and other documents filed with the court shall be typed on 8 1/2 x 11 inch paper. [Adopted March 25, 1977, effective July 1, 1977; amended March 24, 1982, effective July 1, 1982; amended March 30, 1984, effective July 1, 1984; amended March 20, 1985, effective July 1, 1985.]

Rule 7. Substitution of party. — Upon the death or disability of a party to a proceeding governed by these rules, or upon the assignment, transfer, or the accession to the interest or office of party to a proceeding governed by these rules by another person, the representative, or successor in interest of such party shall file a notification of substitution of party and serve the same on all parties to the proceeding or appeal. The substitution shall be effective unless an objection thereto is made within fourteen (14) days of service, by a motion to disallow such substitution, in the manner provided for motions under Rule 32. [Adopted March 25, 1977, effective July 1, 1977; amended April 11, 1979, effective July 1, 1979.]

Rule 7.1. Intervention. — Any person or entity who is a real party in interest to an appeal or proceeding governed by these rules or whose interest would be affected by the outcome of an appeal or

proceeding under these rules may file a verified petition with the Supreme Court asking for leave to intervene as a party to the appeal or proceeding and serve a copy thereof upon all parties to the appeal or proceeding. The petition shall be processed as a motion in accordance with rule 32 of these rules, and if the Supreme Court finds that such petitioning person or entity is a real party in interest or would be affected by the outcome of the appeal or proceeding, the Court may, in its discretion, grant leave to the petitioning party to intervene as a party appellant or respondent; and if leave is so granted such petitioning party shall thereafter be a party to the appeal or proceedings for all purposes under these rules. [Adopted April 11, 1979, effective July 1, 1979.]

Rule 8. Amicus curiae. — An attorney, or person or entity through an attorney, may appear as amicus curiae in any proceeding by request of the Supreme Court; or by leave of the Supreme Court upon written application served upon all parties, setting forth the particular employment, if any, the interest of the applicant in the appeal or proceeding and the name of the party in whose support the amicus curiae would appear. The application shall also state whether leave is sought to file an amicus curiae brief or participate in oral argument, or both. Any objection to the appearance of an amicus curiae must be made by motion within 14 days of service of the application in the manner provided for motions under Rule 32. Leave to appear as amicus curiae shall be by written order of the Supreme Court which shall specify the manner of appearance by the amicus curiae attorney and state the time for filing of any amicus curiae brief. [Adopted March 25, 1977, effective July 1, 1977; amended April 18, 1983, effective July 1, 1983; amended March 23, 1990, effective July 1, 1990.]

Rule 9. Appearance of attorneys not licensed in Idaho. — Upon written motion of a licensed Idaho attorney, at least 14 days

before a hearing or argument, and upon order of the Supreme Court an attorney not licensed in Idaho may be permitted to appear and argue before the Supreme Court in association with such Idaho licensed attorney. The motion, or a supporting statement, shall certify that the attorney not licensed in Idaho is a licensed attorney in good standing in another specific state or jurisdiction. [Adopted March 25, 1977, effective July 1, 1977; amended March 28, 1986, effective July 1, 1986.]

Rule 10. Hearings by the Supreme Court. — The Supreme Court shall hold terms of Court as provided by the Idaho constitution, the statutes of the state of Idaho and the rules of the Supreme Court, and will hear appeals and petitions in accordance with the following procedure:

(a) Terms of Court. The Supreme Court will hold terms of Court as required by the Idaho Constitution and such other terms as may be set by the Court. In addition, the Supreme Court may set cases individually for hearing or argument. Changes in the terms of Court may be made by order of the Supreme court.

(b) Hearing Appeals Outside of Terms of court. The Court may set and hear appeals and petitions before a quorum of the Court at any time and at any place within the state of Idaho.

(c) Register of Actions. The Clerk shall number consecutively and enter all cases in a Register of Actions in the order of the filing with the Supreme Court of the initial document in each proceeding. All cases will be heard in the division and in the order in which they come at issue, unless otherwise ordered. Provided, the Clerk shall, upon order of the Court, transfer the appeal filed in any division to a special calendar of the Court of expedited appeals for hearing in Boise or at such other place as the Court may order.

(d) Divisions and Calenders. There shall be five appellate divisions in the state and calendars of appeals as follows:

(1) The Coeur d'Alene division calendars shall contain all appeals filed in the counties of the First Judicial District.

(2) The Lewiston division calendars shall contain all appeals filed in the counties of the First Judicial District.

(3) The Boise division calendars shall contain all appeals filed in the counties of the Third and Fourth Judicial Districts.

(4) The Twin Falls division calendars shall contain all appeals filed in the counties of the Fifth Judicial District.

(5) The Pocatello division calendars shall contain all appeals filed in the counties of the Sixth and Seventh Judicial District.

(e) Expedited Calendar. There shall be an additional calendar of expedited appeals and petitions for hearing in Boise or at such other place as ordered by the Court, and the Clerk shall transfer such appeals and petitions from any of the above divisions to the expedited calendar as directed by the Court. [Adopted March 25, 1977, effective July 1, 1977; amended March 26, 1992, effective July 1, 1992.]

Rule 11. Appealable judgments and orders. — An appeal as a matter of right may be taken to the Supreme court from the following judgments and orders:

(a) Civil Actions. From the following judgments and orders of a district court granting or denying peremptory writs of mandate and prohibition.

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(2) Decisions by the district court dismissing, affirming, reversing or remanding an appeal.

(3) Judgments made pursuant to a partial judgment certified by the trial court to be final as provided by Rule 54(b), I.R.C.P.

(4) Any contempt order or judgment certified by the trial court to be final as provided by Rule 54(b), I.R.C.P.

(5) An order granting or refusing a new trial, including such orders which contain a conditional grant or denial of a new trial subject to additur and remittitur.

(6) An order granting or denying a motion for judgment notwithstanding the verdict.

(7) Any order made after final judgment including an order denying a motion to set aside a default judgment, but excluding an order granting a motion to set aside a default judgment.

(b) Probate Proceedings. From any interlocutory or final order, judgment or decree of a district court in a probate proceeding, whether original or appellate, which is or would be appealable from the magistrates division to the district court by statute or these rules.

(c) Criminal Proceedings. From the following judgments and orders of the district court in a criminal action, whether or not the trial court retains jurisdiction:

(1) Final judgments of conviction.

(2) An order granting or denying a withheld judgment on a

verdict or plea of guilty.

(3) An order granting a motion to dismiss an information or complaint.

(4) Any order or judgment, whenever entered and however denominated, terminating a criminal action, provided that this provision shall not authorize a new trial in any case where the constitutional guarantee against double jeopardy would otherwise prevent a second trial.

(5) Any order, however denominated, reducing a charge of criminal conduct over the objection of the prosecutor.

(6) Any judgment imposing sentence after conviction, except a sentence imposing the death penalty which shall not be appeal able until the death warrant is issued as provided by statute.

(7) An order granting a motion to suppress evidence.

(8) An order granting or denying a motion for new trial.

(9) Any order made after judgment affecting the substantial rights of the defendant or the state.

(10) Decisions by the district court on criminal appeals from a magistrate, either dismissing the appeal or affirming, reversing or remanding.

(d) Administrative Proceedings — Industrial Commission. From any final decision or order of the Industrial Commission or from any final decision or order upon rehearing or reconsideration by the administrative agency.

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(e) Administrative Proceedings — Public Utilities Commission. From any decision or order of the Public Utilities Commission which is appealable to the Supreme Court by statute.

(f) Cross-appeals and additional issues on appeal. — After an appeal has been filed from a judgment or order specified above in this rule, a timely cross-appeal may be filed from any interlocutory or final judgment order or decree. If no affirmative relief is sought by way of reversal, vacation or modification of the judgment, order or decree, an issue may be presented by the respondent as an additional issue on appeal under Rule 35(b)(4) without filing a cross-appeal. [Adopted March 25, 1977, effective July 1, 1977; amended March 31, 1978, effective July 1, 1978; amended March 24, 1982, effective July 1, 1982; amended March 30, 1984, effective July 1, 1984; amended March 20, 1985, effective July 1, 1985; amended March 28, 1986, effective July 1, 1986; amended June 15, 1987; effective November 1, 1987; amended March 20, 1991, effective July 1, 1991.]

Rule 11.1. Signing of notice of appeals, petitions, motions, briefs and other papers; sanctions. — Every notice of appeal, petition, motion, brief and other document of a party represented by an attorney shall be signed by at least one (1) licensed attorney of record of the state of Idaho, in the attorney's individual name, whose address shall be stated before the same may be filed. A party who is not represented by an attorney shall sign the notice of appeal, petition, motion, brief or other document and state the party's address. The signature of an attorney or party constitutes a certificate that the attorney or party has read the notice of appeal, petition, motion, brief or other document; that to the best of the signer's knowledge, information, and belief after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or

reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If the notice of appeal, petition, motion, brief, or other document is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the notice of appeal, petition, motion, brief or other document including a reasonable attorney's fee. [Adopted June 15, 1987, effective November 1, 1987.]

Rule 12. Appeal by permission. — (a) Criteria for permission to appeal. Permission may be granted by the Supreme Court to appeal from an interlocutory order or decree of a district court in a civil or criminal action, or from an interlocutory order of an administrative agency, which is not otherwise appealable under these rules, but which involves a controlling question of law as to which there is substantial grounds for difference of opinion and in which an immediate appeal from the order or decree may materially advance the orderly resolution of the litigation; provided, in criminal actions permission to appeal under this rule may be granted only upon application by the defendant.

(b) Motion to District Court or Administrative Agency — Order. A motion for permission to appeal from an interlocutory order or decree, upon the grounds set forth in subdivision (a) of this rule, shall be filed with the district court or administrative agency within fourteen (14) days from date of entry of the order or decree. The motion shall be filed, served, noticed for hearing and processed in the same manner as any other motion, and hearing of the motion shall be expedited. In criminal actions a motion filed by the defendant shall be served upon the prosecuting attorney of the

county. The court or agency shall, within fourteen (14) days after the hearing, enter an order approving or disapproving the motion.

(c) Motion to Supreme Court for Permission to Appeal. (1) Motion of a party. Within fourteen (14) days from entry by the district court or administrative agency of an order approving or disapproving a motion for permission to appeal under subdivision (b) of this rule, any party may file a motion with the Supreme Court requesting acceptance of the appeal by permission. A copy of the order of the district court or administrative agency approving or disapproving the permission to appeal shall be attached to the motion. If the district court or administrative agency fails to rule upon a motion for permission to appeal within twenty-one (21) days from the date of the filing of the motion, any party may file a motion with the Supreme Court for permission to appeal without ay order of the district court or administrative agency.

(2) Motion by order of court or agency. A district court or administrative agency may enter, on its own initiative, an order recommending permission to appeal from an interlocutory order or decree. The court or agency shall file a certified copy of its order with the Supreme Court and serve copies on all parties. The order recommending permission to appeal shall constitute and be treated as a motion for permission to appeal from the interlocutory order or decree under this rule.

(3) Procedure. A motion to the Supreme Court for permission to appeal under this rule shall be filed, served, and processed in the same manner as any other motion under Rule 32 of these rules. In criminal actions a motion filed by the defendant shall be served upon the prosecuting attorney of the county and the attorney general of the state of Idaho.

(d) Acceptance by Supreme Court. Any appeal by permission of an interlocutory order or decree under this rule shall not be valid and effective unless and until the Supreme Court shall enter an order accepting such interlocutory order or decree as appealable and granting leave to a party to file a notice of appeal within a time certain. Such appeal shall thereafter proceed in the same manner as an appeal as a matter of right, unless otherwise ordered by the Supreme Court in its order of acceptance. The clerk of the Supreme Court shall file with the district court or administrative agency a copy of the order of the Supreme Court granting or denying acceptance, and shall mail copies to all parties to the action or proceeding. [Adopted March 24, 1982, effective July 1, 1982; amended April 18, 1983, effective July 1, 1983; amended March 23, 1990, effective July 1, 1990.]

Rule 12.1. Certification of a question of law from a United States court. — (a) Certification of a Question of Law. The Supreme Court of the United States, a Court of Appeals of the United States or a United States District Court may certify in writing to the Idaho supreme Court a question of law asking for a declaratory judgment or decree adjudicating the Idaho law on such question if such court, on the court's own motion or upon the motion of any party, finds in a pending action that:

(1) The question of law certified is a controlling question of law in the pending action in the United States court as to which there is no controlling precedent in the decisions of the Idaho Supreme Court, and

(2) An immediate determination of the Idaho law with regard to the certified question would materially advance the orderly resolution of the litigation in the United States court.

(b) Filing with Idaho Supreme Court. Upon the certification of a question of law to the Idaho Supreme Court under this rule, the United States court or any party in the action pending in that court, may file a certified copy of its order of certification with the Idaho Supreme Court without the payment of any filing fee. Any party to the action pending in the United States court may file a statement or brief in support of, or in opposition to, the certification of the question of law to the Idaho Supreme Court within fourteen days from the date of filing of the Order of Certification.

(c) Acceptance by the Idaho Supreme Court. The Idaho Supreme Court may in its discretion accept the question of law certified by the United States court under this rule unless it finds that it appears that there is another ground for determination of the case pending in the United States court, or that the question certified for adjudication under this rule is not clearly defined in the Order of Certification, or that there is not an adequate showing that the question of law qualifies for determination under subsection (a) of this rule. The Idaho Supreme Court will enter an order either accepting or rejecting the question certified to it by the United States court and serve copies of such order upon the United States court and all parties to that pending action. If the Idaho Supreme Court accepts the certified question of law for adjudication, the Idaho Supreme Court will, in its order of acceptance, set forth the procedure to be followed in the adjudication proceeding including the sequence and time for the filing of briefs by the parties to the pending action in the United States court. The Idaho Supreme Court may, in its discretion, also require copies of all or any portion of the clerk's record or reporter's transcript before the United States court to be filed with the Court, if in the opinion of the Court such documents are necessary in the determination of the question certified.

(d) Argument on Certified Question Before the Idaho Supreme Court. Upon acceptance of a question of law for adjudication under this rule, the Idaho Supreme Court will at that time, or at such later time as the Court deems appropriate, determine whether oral argument is required on the certified question of law and will advise the parties to the pending action in the United States court as to the time, place and procedure for presenting oral arguments to the Court.

(e) Adjudication of Certified Question of Law. Upon adjudication of a question of law certified under this rule, the Idaho Supreme Court will issue a written opinion in the same manner as an opinion in appeal to the Idaho Supreme Court and such opinion shall be distributed, published and reported in the same manner as an opinion in an appeal. [Adopted April 3, 1981, effective July 1, 1981.]

Rule 13. Stay of proceedings upon appeal or certification. — (a) Temporary Stay in Civil Actions Upon Filing a Notice of Appeal or Notice of Cross-Appeal. Unless otherwise ordered by the district court, upon the filing of a notice of appeal or notice of cross-appeal all proceedings and execution of all judgments, orders or decrees in a civil action in the district court, shall be automatically stayed for a period of fourteen (14) days. Any further stay shall be only by order of the district court or the Supreme Court. Any stay of orders or proceedings in the Industrial Commission or the Public Utilities Commission shall be as provided in Rule 13(d) and (e).

(b) Stay Upon Appeal — Powers of District Court — Civil Actions. In civil actions, unless prohibited by order of the Supreme Court, the district court shall have the power and authority to rule upon the following motions and to take the following actions during the pendency on an appeal;

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(1) Settle the transcript on appeal.

(2) Rule upon any motion for new trial.

(3) Rule on any motion to amend findings of fact or conclusions of law.

(4) Rule on any motion to amend the judgment.

(5) Rule upon any motion for judgment notwithstanding the verdict.

(6) Rule on any motion under Rule 60(a) or (b), I.R.C.P.

(7) Rule upon any motion for reconsideration filed pursuant to Rule 11(a)(2)(B), I.R.C.P.

(8) Enter a stay of execution or enforcement of any injunction or mandatory order entered by the court upon such conditions and upon the posting of such security as the court determines in its discretion.

(9) Make any order regarding the taxing of costs or determination of attorneys fees incurred in the trial of the action.

(10) Make any order regarding the se, preservation or possession of any property which is the subject of the action on appeal.

(11) Take any action or enter any order deemed advisable in the discretion of the court with regard to the custody or support of children pending any appeal involving the custody or support of

such children, and to amend or modify such order from time to time, during the pendency of the appeal, by reason of changes of circumstances of the parties.

(12) Make any order which the district court deems appropriate in its discretion for the payment or advancement of attorneys fees and/or anticipated costs on appeal by one party to the other, subject to the order of the Supreme Court determining the right to, and amount of, attorneys fees on appeal.

(13) Take any action or enter ay order required for the enforcement of any judgment, order or decree.

(14) Stay execution or enforcement of any judgment, order or decree appealed from, other than a money judgment, upon the posting of such security and upon such conditions as the district court shall determine.

(15) Stay execution or enforcement of a money judgment upon the posting of a cash deposit or supersedes bond by a fidelity, surety, guaranty, title or trust company authorized to do business in the state and to be a surety on undertakings and bonds, either of which must be in the amount of the judgment or order, plus 36% of such amount. Provided, an agreement not to execute on the judgment made pursuant to Rule 16(b) may be filed in lieu of such bond or cash deposit. Any bond filed pursuant to this rule shall state that the company issuing or executing the same agrees to pay on behalf of the appellant all sums found to be due and owing by the appellant by reason of the outcome of the appeal, within 30 days of the filing of the undertaking. A copy of the bond, agreement not to execute, or notification of a cash deposit shall be served upon all parties to the appeal at the time of the application for the stay of execution. Any objection to the sufficiency of a cash deposit or bond posted under this rule shall be waived unless a written objection is made in the form of a motion and filed with the district

court within 21 days of the filing of such bond or cash deposit. The district court shall rule upon such objection in the same manner as any other motion under the I.R.C.P. If the district court stays execution or enforcement of a money judgment upon the posting of a cash deposit or supersedes bond, the court may, upon motion or application, cause or direct any judgment lien filed to be released.

(16) Any order of the Supreme Court as to whether or not a judgment, order, decree or proceeding shall be stayed shall take precedence over any order entered by the district court.

(17) Rule on any motion or application for the issuance of a Rule 54(b) I.R.C.P. certificate making a partial judgment final and appealable.

(18) Take any action and rule upon all matters, including conduct of a trial, during a permissive appeal under Rule 12 I.A.R. or during an appeal from a partial judgment certified as final under Rule 54(b) I.R.C.P., if approved by the Supreme Court under Rule 13.4.

(19) Rule upon any application for court appointed counsel in a civil case, including a petition for habeas corpus or a petition for post-conviction relief.

(c) Stay Upon Appeal — Powers of District Court — Criminal Action. In criminal actions, unless prohibited by order of the Supreme Court, the district court shall have the power and authority to rule upon the following motions and to take the following actions during the pendency of an appeal:

(1) Settle the transcript on appeal.

(2) Rule upon any motion for a new trial.

(3) Rule upon any motion for arrest of judgment.

(4) Conduct any hearing, and make any order, decision or judgment allowed or permitted by § 19-2601, Idaho Code.

(5) Conduct any hearing and make any order, decision or judgment with regard to an originally withheld judgment upon a plea or verdict of guilty.

(6) Place a defendant upon probation, modify or revoke such probation, or sentence a defendant upon revocation of probation.

(7) Determine and order whether there shall be a stay of execution of a judgment of conviction upon an appeal to the Supreme Court, except where the sentence is capital punishment, in which case execution of the sentence shall be automatically stayed pending appeal.

(8) Determine whether the defendant should be allowed bail, and if the defendant is allowed bail:

(i) Determine the amount of bail;

(ii) Modify the amount of bail from time to time;

(iii) Forfeit bail for violation of any of its conditions;

(iv) Issue a warrant for the arrest of the defendant for violation of bail.

(9) Determine whether the defendant is entitled to a transcript

and court appointed attorney on appeal at public expense, and if so, appoint an attorney for the defendant and upon the filing of a notice of appeal, order the preparation of the transcript and record at county expense.

(10) Enter any other order after judgment affecting the substantial rights of the defendant as authorized by law.

(11) Rule upon a motion to correct or reduce a sentence under Rule 35 I.C.R.

(12) Sentence a defendant for a crime for which the defendant had been found guilty and which has been appealed.

(d) Stay Upon Appeal From the Industrial Commission. In administrative appeals from the Industrial Commission the order or award shall be stayed as provided by statute during the pendency of the appeal, unless otherwise ordered by the Industrial Commission or the Supreme Court.

(e) Stay Upon Appeal From the Public Utilities Commission. In administrative appeals from the Public Utilities Commission. In administrative appeals from the Public Utilities Commission, unless stayed by the Supreme Court, the administrative agency shall have continued jurisdiction of the matter and the parties consistent with the provisions of applicable statutes including the power to settle the transcript and record on appeal.

(f) Stay Upon Permissive Appeal. (1) Stay during processing of motion for permission to appeal. The filing of a motion for permission to appeal under Rule 12 shall not automatically stay the action or proceeding nor the enforcement of the interlocutory judgment, order or decree. After a motion for permission to appeal has been filed, the district court or administrative agency, or the

Supreme Court, may grant a stay in the manner provided in this Rule for a stay during an appeal.

(2) Stay after a motion for permission to appeal has been granted. The granting of a motion for permission to appeal under Rule 12 by the Supreme Court automatically stays the entire action or proceeding until the appeal has terminated, and during that time the district court or administrative agency shall have no power or authority over the action or proceeding, except as provided in subsections (a), (b), (c), (d) and (e) of this Rule. Provided, the granting of the motion for permission to appeal does not stay the enforcement of any judgment, order or decree, but the district court or administrative agency, or the Supreme Court, may grant a stay in the manner provided in this Rule for a stay during an appeal.

(g) Stay by Supreme Court. The Supreme Court may also, in its discretion, enter an order staying a proposed act, a pending action or proceeding, or the enforcement of any judgment, order or decree, including but not limited to an injunction, writ of mandamus or prohibition, at any time during the pendency of an original application or petition for any extraordinary writ, or during the pendency of any appeal or a motion for certification of appeal. Any order of the supreme Court shall take precedence over any order entered by the district court or administrative agency. Provided, in any appeal from the district court or an administrative agency, a party desiring to obtain any such stay must first make application to the district court or administrative agency before making application to the Supreme Court. If a district court or administrative agency denies an application for stay, or fails to act upon the application within fourteen (14) days after the filing of the application, any party may apply to the Supreme Court for a stay. If a district court or administrative agency grants a stay, any party may apply to the Supreme Court to modify or vacate the stay.

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[Adopted March 25, 1977, effective July 1, 1977; amended April 11, 1979, effective July 1, 1979; amended March 24, 1982, effective July 1, 1982; amended March 28, 1986, effective July 1, 1986; amended June 15, 1987, effective November 1, 1987; amended March 27, 1989, effective July 1, 1989; amended March 23, 1990, effective July 1, 1990; amended February 10, 1993, effective July 1, 1993.]

Rule 13.1. Ex parte temporary stay. — (a) Application. A party may file in the Supreme Court an application for an ex parte temporary stay of execution of an order or judgment pending the determination of an application made to the Supreme Court under Rule 13(g) for stay during the appeal. Such application shall be made by verified petition, motion or application which shall certify what efforts, if any, have been made to give notice of the application to the adverse party or shall state the reasons supporting the claim that notice should not be required.

(b) Ex parte temporary stay. The Supreme Court, acting through three or more members, may issue an ex parte temporary stay of execution pending the determination of an application for stay during the appeal. An ex parte temporary stay may be granted only if it appears from the specific facts shown by the verified petition, motion or application that immediate and irreparable injury, loss, or damage will result to the applicant before a ruling can be had upon the application for stay during the appeal. An ex parte stay may issue with or without security, in the discretion of the Supreme Court, and will state the duration and any conditions of the temporary stay.

(c) Motion to dissolve temporary stay. Any party affected by an ex parte temporary stay under this rule may file a motion with the Supreme Court to dissolve such temporary stay and shall serve

the motion on all parties to the appeal. The motion shall be processed by the Supreme Court in such manner as it deems appropriate under the circumstances. [Adopted March 24, 1982, effective July 1, 1982; amended March 27, 1989, effective July 1, 1989; amended February 10, 1993, effective July 1, 1993.]

Rule 13.2. Suspension of appeal. — Proceedings in an appeal before the Supreme Court may be suspended only by order of the Supreme Court on motion showing good cause. An order suspending an appeal will state the duration and any conditions of such suspension, which may be terminated or extended by further order of the court upon application of any party or upon the initiative of the Court. [Adopted March 24, 1982, effective July 1, 1982.]

Rule 13.3. Temporary remand to district court or administrative agency. — (a) Remand by the Court. At any time before the issuance of an opinion, the Supreme Court may on its own motion, or on motion of any party showing good cause, order a case to be remanded to the district court or to the administrative agency to take further action as designated in the order of remand.

(b) Effect of Remand. During a remand to the district court or administrative agency the appeal shall remain pending in the Supreme Court, but the district court or administrative agency shall have jurisdiction to take all actions necessary to fulfill the requirements of the order of remand. [Adopted March 28, 1986, effective July 1, 1986.]

Rule 13.4. Delegation of jurisdiction to district court during an appeal. — During a permissive appeal under Rule 12 I.A.R. or an appeal from a partial judgment certified as final under Rule 54(b) I.R.C.P., the Supreme Court may, by order, delegate

jurisdiction to the district court to take specific actions and rule upon specific matters, which may include jurisdiction to conduct a trial of issues. A motion for an order under this rule may be filed with the Supreme Court by any party. [Adopted March 27, 1989, effective July 1, 1989.]

Rule 13.5. Stipulation for vacation, reversal or modification of judgment. — Upon stipulation of all affected parties that a criminal or civil judgment of the trial court or administrative agency may be vacated, reversed, modified or remanded for further hearings, the court may enter an order accomplishing the stipulated result without briefs, oral argument, or an opinion of the court. An order entered by the court pursuant to such a stipulation shall not be considered as precedent for any purpose other than a resolution of that appeal. The clerk of the court shall issue a remittitur for the order under Rule 38 in the same manner as a remittitur on an opinion of the court. [Adopted March 23, 1990, effective July 1, 1990; amended March 20, 1991, effective July 1, 1990.]

Rule 14. Time for filing appeals. — All appeals permitted or authorized by these rules, except as provided in Rule 12, shall be taken and made in the manner and within the time limits as follows:

(a) Appeals From the District Court. Any appeal as a matter of right from the district court may be made only by physically filing a notice of appeal with the clerk of the district court within 42 days from the date evidenced by the filing stamp of the clerk of the court on any judgment, order or decree of the district court appealable as a matter of right in any civil or criminal action. The time for an appeal from any civil judgment, order or decree in an action is terminated by the filing of a timely motion which, if

granted, could affect any findings of fact, conclusions of law or any judgment in the action (except motions under Rule 60 of the Idaho Rules of Civil Procedure or motions regarding costs or attorneys fees), in which case the appeal period for all judgments, orders and decrees commences to run upon the date of the clerk's filing stamp on the order deciding such motion. The time for an appeal from any criminal judgment, order or sentence in an action is terminated by the filing of a motion within fourteen (14) days of the entry of the judgment which, if granted, could affect the judgment, order or sentence in the action, in which case the appeal period for the judgment and sentence commences to run upon the date of the clerk's filing stamp to the order deciding such motion. In a criminal case, the time to file an appeal is enlarged by the length of time the district court actually retains jurisdiction, up to one hundred and twenty (120) days and an extension up to an additional sixty (60) days pursuant to Section 19-2601(4) Idaho Code. When the court releases its retained jurisdiction or places the defendant on probation, the time within which to appeal shall commence to run. Provided, if a criminal judgment imposes the sentence of death, the time within which to file a notice of appeal does not commence to run until the death warrant is signed and filed by the court.

(b) Appeals From an Administrative Agency. An appeal as a matter of right from an administrative agency may be made only by physically filing a notice of appeal with the Public Utilities Commission or the Industrial Commission within 42 days from the date evidenced by the filing stamp of the clerk or secretary of the administrative agency on any decision, order or award appealable as a matter of right. The time for an appeal from such decision, order or award of the industrial commission is terminated by a timely motion for rehearing or reconsideration of the decision or order which, if granted, could affect the decision, order or award

(except motions regarding costs or attorneys fees), in which case the appeal period commences to run upon the date of the filing stamp on the order or decision denying such motion or the decision on rehearing or reconsideration. The time for an appeal from such decision, order or award of the public utilities commission begins to run when an application for rehearing is denied, or, if the application is granted, after the date evidenced by the filing stamp on the decision on rehearing. [Adopted March 25, 1977, effective July 1, 1977; amended March 31, 1978, effective July 1, 1978; amended April 3, 1981, effective July 1, 1981; amended April 18, 1983, effective July 1, 1983; amended March 30, 1984, effective July 1, 1984.]

Rule 15. Cross-appeal after an appeal. — (a) Right to cross-appeal. After an appeal has been filed, a timely cross-appeal may be filed from any interlocutory or final judgment, order or decree. If no affirmative relief is sought by way of reversal, vacation or modification of the judgment, order or decree, an issue may be presented by the respondent as an additional issue on appeal under Rule 35(b)(4) without filing a cross-appeal.

(2) Time for filing. A cross-appeal, as a matter of right, may be made only by physically filing the notice of cross-appeal with the clerk of the district court or administrative agency within the 42 day time limit prescribed in Rule 14, as it applies to the judgment, order or decree from which the cross-appeal is taken, or within 21 days after the date of filing of the original notice of appeal, whichever is later. [Adopted March 27, 1989, effective July 1, 1989.]

Rule 16. Bonds on appeal. — (a) No Cost Bond Required. No undertaking on appeal for costs shall be required.

(b) Waiver of Supersedes Bond. The party in whose favor an execution may issue may agree in writing that the party will not execute pending the appeal, in which case no supersedes bond shall be necessary to stay execution and the district court shall issue a stay so that no writ of execution shall issue on the judgment, or be served if already issued, pending final disposition of appeal. [Adopted March 25, 1977, effective July 1, 1977.]

Rule 17. Notice of appeal — Contents. — A notice of appeal shall contain substantially the following information:

(a) Title. The title of the action or proceeding.

(b) Court or Agency Title. The title of the court or agency which heard the trial or proceeding and the name and title of the presiding judge or official.

(c) Case Number. The number assigned to the action or proceeding by the trial court or administrative agency.

(d) Parties. The name of the appealing party and the party's attorney and the name of the adverse party and that party's attorney.

(e) Designation of Appeal. (1) A Designation of the Judgment, Order or Decree Appealed From. The notice of appeal shall designate the final judgment, order or decree appealed from which shall be deemed to include, and present on appeal:

(A) All interlocutory judgments, orders and decrees entered prior to the judgment, order or decree appealed from, and

(B) All final judgments, orders and decrees entered prior to the judgment, order or decree appealed from for which the time for appeal has not expired, and

(C) All interlocutory or final judgments, orders and decrees entered after the judgment, order or decree appealed from.

(2) Premature Filing of Notice of Appeal. A notice of appeal filed from an appealable judgment, order or decree before formal written entry of such document shall become valid upon the filing and the placing the of the clerk of the court on such appealable judgment, order or decree, without refiling the notice of appeal.

(f) Jurisdictional Statement. A statement as to the basis for the right to appeal to the Idaho Supreme Court from the judgments or orders described in paragraph 1 of the notice of appeal.

(g) Transcript. A designation as to whether a transcript is requested, and if requested, whether a standard transcript, a supplemented transcript, or a partial transcript as defined in Rule 25 is requested by the appellant. The notice shall also state whether appellant requests that the transcript be prepared in compressed format as described in Rule 26. If a supplemented transcript is requested, the request shall specifically identify each of the items of additional record requested which would otherwise be excluded under Rule 25(a)(1), (2), (4), (5), and (6).

(h) Record. A designation of documents, if any, to be included in the clerk's or agency's record in addition to those automatically included pursuant to the following Rule 28.

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(i) Certification. A certification of the attorney of the appellant, or affidavit of the appellant representing himself or herself:

(1) That service of the notice of appeal has been made upon the reporter of the trial or proceeding;

(2) That the clerk of the district court or administrative agency has been paid the estimated fees for preparation of the designated reporter's transcript as required by Rule 24, or that appellant is exempt from paying such fees because of stated reasons;

(3) That the estimated fees for preparation of the clerk's or agency's record have been paid, or that appellant is exempt from paying such fees because of stated reasons;

(4) That all appellate filing fees have been paid, or that appellant is exempt from paying such fees because of stated reasons; and

(5) That service has been made upon all other parties required to be served pursuant to Rule 20, and that in all cases referred to in Section 67-1401(1), Idaho Code, service has been made upon the attorney general of the state of Idaho.

The appellant shall not be required to certify the payment of estimated fees in criminal appeals, appeals from denial of a petition for writ of habeas corpus, or petitions for post-conviction relief, if the district court has entered an order, or thereafter enters an order within 14 days of filing the notice of appeal, that such costs shall be at county expense.

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(j) Amended Notice of Appeal. — In the event the original notice of appeal erroneously states any of the information and requirements of this rule or additional facts arise after the filing of the initial notice of appeal, the appellant may thereafter file an amended notice of appeal correctly setting forth the facts and information. An amended notice of appeal shall be filed with the clerk of the district court in the same manner as the original notice of appeal but no filing fee shall be required. If the original notice of appeal was timely filed from an appealable judgment, order or decree, the amended notice of appeal will relate back to the date of filing of the original notice of appeal.

(k) Signature. The name and signature of the attorney for the appellant, or name of appellant if the appellant does not have an attorney.

(l) Form. The notice of appeal shall be in substantially the following form:

(Appellant's Attorney's Name)
Attorney for Appellant
Post Office Address
Phone Number

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IN THE DISTRICT COURT OF THE ____ JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR ____ COUNTY (IN THE (PUBLIC UTILITIES COMMISSION) (INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

(Title of original action or proceeding together with the additional designation of parties as appellant and respondent)

Case No. _____
NOTICE OF APPEAL

TO: THE ABOVE NAMED RESPONDENT(S), (Names) AND THE PARTY'S ATTORNEYS, (Names and Addresses) AND THE CLERK OF THE ABOVE ENTITLED COURT (ADMINISTRATIVE AGENCY).
NOTICE IS HEREBY GIVEN THAT:

1. The above named appellant(s) (Name) appeal(s) against the above named respondent(s) to the Idaho Supreme Court from (The final judgment) (The order, describing it)_____, entered in the above entitled action (proceeding) on the _____ day of _____, (Honorable Judge _____) (Chairman _____) presiding.

2. That the party has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rule [e.g. (11(a)(2)), or (12(a))] I.A.R.

3. (a) Is a reporter's transcript requested?_____

(b) The appellant requests the preparation of the following portions of the reporter's transcript:

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e.g. (The entire reporter's standard transcript as defined in Rule 25(a), I.A.R.)
(The entire reporter's standard transcript supplemented by the following:)
(Voir dire examination of jury)
(Closing arguments of counsel)
(The following reporter's partial transcript:)
(The testimony of witness "X")
Conferences on requested instructions)
(Instructions verbally given by court)

4. The appellant requests the following documents to be included in the clerk's (agency's) record in addition to those automatically included under Rule 28, I.A.R.

eg. (All requested and given jury instructions)
(The deposition of "X")
(Plaintiff's motion for continuance of trial)

5. I certify:

(a) That a copy of this notice of appeal has been served on the reporter.

(b) (1) ❑ That the clerk of the district court or administrative agency has been paid the estimated fee for preparation of the reporter's transcript.

(2) ❑ That theappellant is exempt from paying the estimated trancript fee because _____

_____

(c) (1) ❑ That the estimated fee for preparation of the clerk's or agency's record has been paid.

(2) ❑ That the appellant is exempt from paying the estimated fee for the preparation of the record because _____

_____

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(d) (1) ❑ That the appellate filing fee has been paid.

(2) ❑ That appellant is exempt from paying the appellate filing fee because _____

_____.

(e) That service has been made upon all parties required to be served pursuant to Rule 20. (and the attorney general of Idaho pursuant to Section 67-1401(1), Idaho Code.)

DATED THIS _____ day of _____, 19_____.

/s/ Attorney's signature

_____

(Name of Attorney or firm for Appellant)

Attorneys for the Appellant

(When certification is made by a party instead of the party's attorney the following affidavit must be executed pursuant to Rule 17(i))

State of Idaho }
County of _____ } ss.

_____ being sworn, deposes and says:

That the party is the appellant in the above-entitled appeal and that all statements in this notice of appeal are trus and correct to the best of his or her knowledge and belief.

_____

Signature of Appellant

Subscribed and Sowrn to before me this____, day of_____, 19___.

_____

Title

Residence

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[Adopted March 25, 1977, effective July 1, 1977; amended March 31, 1978, effective July 1, 1978; amended April 11, 1979, effective July 1, 1979; amended December 27, 1979, effective July 1, 1980; amended April 18, 1983, effective July 1, 1983; amended March 30, 1984, effective July 1, 1984; amended June 15, 1987, effective November 1, 1987; amended March 27, 1989, effective July 1, 1989; amended March 26, 1992, effective July 1, 1992.]

Rule 18. Notice of cross-appeal — Contents. — A notice of appeal shall contain substantially the following information:

(a) Title. The title of the action or proceeding.

(b) Court or Agency Title. The title of the court or agency which heard the trial or proceeding and the name and title of the presiding judge or official.

(c) Case Number. The number assigned to the action or proceeding by the trial court or administrative agency.

(d) Parties. The name of the party cross-appealing and the party's attorney and the name of the adverse party and that party's attorney.

(e) Designation of Appeal. A designation of the judgment, order or decree appealed from shall be deemed to include, and present on appeal, the same interlocutory and final judgments, orders and decrees in the same manner as provided for a notice of appeal under Rule 17(e).

(f) Jurisdictional Statement. A statement as to the basis for the right to cross-appeal to the Idaho Supreme Court from the judgments or orders described in paragraph 1 of the notice of cross-appeal.

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(g) Transcript. A designation as to what portion, if any, f the reporter's transcript is requested by the cross-appellant in addition to those requested by the appellant in the original notice of appeal, and a certification that the estimated reporter's fee for the transcript requested by the cross-appeal has been paid or that payment is exempt.

(h) Record. A designation of documents, if any, to be included in the clerk's or agency's record in addition to those automatically included pursuant to the following Rule 28 and those designated by the appellant in the initial notice of appeal.

(i) Certification. A certification of the attorney of the cross-appellant, or affidavit of the person representing himself or herself:

(1) That service of the notice of cross-appeal and any request for additional transcript has been made upon the reporter;

(2) That the estimated reporter's fees for the requested transcript, if any, have been paid, or that cross-appellant is exempt from paying such fees for stated reasons;

(3) That the estimated fees for including any additional documents in the clerk's or agency's record have been paid, or that cross-appellant is exempt from paying such fees for stated reasons.

(4) That all appellate filing fees have been paid, or that cross-appellant is exempt from paying such fees because of stated reasons; and

(5) That service has been made upon all other parties required to be served pursuant to Rule 20; and that in all cases referred to in Section 67-1401(1), Idaho Code, service has been made upon the

attorney general of the state of Idaho.

(j) Amended Notice of Cross-Appeal. — In the event the original notice of cross-appeal erroneously states any of the information and requirements of this rule or additional facts arise after the filing of the initial notice of cross-appeal, the cross-appellant may thereafter file an amended notice of cross-appeal correctly setting forth the facts and information. An amended notice of cross-appeal shall be filed with the clerk of the district court in the same manner as the original notice of cross-appeal but no filing fee shall be required. If the original notice of cross-appeal was timely filed from an appealable judgment, order or decree, the amended notice of cross-appeal will relate back to the date of filing of the original notice of cross-appeal.

(k) Signature. The name and signature of the attorney for the cross-appellant, or name of cross-appellant if the cross-appellant does not have an attorney.

(*l*) Form. The notice of cross-appeal shall be in substantially the following form:

(Cross-Appellant's Attorney's Name)
Attorney for Cross-Appellant
Post Office Address
Phone Number

IN THE DISTRICT COURT OF THE _____ JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR _____ COUNTY (IN THE (PUBLIC UTILITIES COMMISSION) (INDUSTRIAL COMMISSION) OF THE STATE OF IDAHO)

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(Title of original action or proceeding together with the additional designation of parties as cross-appellant and cross-respondent)

Case No. _____
NOTICE OF CROSS-APPEAL

TO: THE ABOVE NAMED CROSS-RESPONDENT(S), (Names) AND THE PARTY'S ATTORNEYS, (Names and Addresses) AND THE CLERK OF THE ABOVE ENTITLED COURT (ADMINISTRATIVE AGENCY). NOTICE IS HEREBY GIVEN THAT:

1. The above named cross-appellant(s) (Name) appeal(s) against the above named cross-respondent(s) to the Idaho Supreme Court from (The final judgment) (The order, describing it), entered in the above entitled action (proceeding) on the ___ day of ____, (Honorable Judge ____) (Chairman ____) presiding.

2. That the party has a right to cross-appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rule [e.g. (11(a)(5)), or (12(a))] I.A.R.

3. (a) Is additional reporter's transcript requested?_____

(b) The cross-appellant requests the preparation of the following portions of the reporter's transcript:

e.g. (The entire reporter's standard transcript as defined in Rule 25 (a), I.A.R.)

(The entire reporter's standard transcript supplemented by the following:)

(Voir dire examination of jury)

(Closing arguments of counsel)

(The following reporter's partial transcript:)

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(The testimony of witness "X")
(Conferences on requested instructions)
(Instructions verbally given by court)

4. The cross-appellant requests the following documents to be included in the clerk's (agency's) record in addition to those automatically included under Rule 28, I.A.R. and those designated by the appellant in the initial notice of appeal:

e.g. (All requested and given jury instructions)
(The deposition of "X")
(Plaintiff's motion for continuance of trial)

5. I certify:

(a) That a copy of this notice of cross-appeal and any request for additional transcript have been served on the reporter.

(b) (1) ❑ That the clerk of the district court or administrative agency has been paid the estimated fee for preparation of the reporter's transcript and any additional documents requested in the cross-appeal.

(2) ❑ That the cross-appellant is exempt from paying the estimated transcript fee because _____
_____

(c) That service has been made upon all parties required to be served pursuant to Rule 20. (and the attorney general of Idaho pursuant to Section 67-1401(1), Idaho Code.)

DATED this ____ day of ____, 19__.

/s/ Attorney's Signature
_____

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(Name of Attorney or Firm for
Cross-Appellant)
Attorneys for Cross-Appellant

(When certification is made by a party instead of the party's attorney the following affidavit must be executed pursuant to Rule 18(i))

State of Idaho
County _____ ss.
_____ being sworn, deposes and says:

That the party is the cross-appellant in the above-entitled cross-appeal and that all statements in this notice of cross-appeal are true and correct to the best of his or her knowledge and belief.

_____
Signature of Cross-Appellant

Subscribed and Sworn to before me this ____ day of ____, 19__.

_____
Title
Residence

[Adopted March 25, 1977, effective July 1, 1977; amended March 31, 1978, effective July 1, 1978; amended April 11, 1979, effective July 1, 1979; amended December 27, 1979, effective July 1, 1980; amended April 18, 1983, effective July 1, 1983; amended March 30, 1984, effective July 1, 1984; amended June 15, 1987, effective November 1, 1987; amended March 27, 1989, effective July 1, 1989.]

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Rule 19. Request for additional transcript or clerk's or agency's record. — (a) Content and Filing. In the event a respondent, or a cross-respondent, desires to include portions of the reporter's transcript or documents in the clerk's or agency's record, in addition to those designated in the notice of appeal or notice of cross-appeal, the respondent or cross-respondent shall file a written request therefore with the clerk of the district court or administrative agency within 14 days of the filing of the original notice of appeal, or within 14 days and an amended notice of appeal which reduces the transcript or record requested. In the event a respondent, or cross-respondent desires that the transcript be produced in compressed format as outlined in Rule 26(c), that party must file a request stating that desire within 14 days of the filing of the original notice of appeal, or within 14 days after the filing of the cross-appeal, or of the filing of the first request for the transcript desired in compressed format. Copies of such requests shall be served upon the appellant or cross-appellant, and upon the reporter if it is a request for additional transcript, or upon the clerk if it is a request for additional record. Upon the filing of such request by a respondent, or cross-respondent, the appellant or the cross-appellant shall within 14 days pay the additional estimated cost for the reporter's transcript or for the clerk's or agency's record, and file a receipt with the court or agency showing such payment, unless otherwise ordered by the court or agency, subject to having such costs taxed to the proper party upon the decision on appeal. Provided, however, that if the additional cost stems solely from the request to produce the transcript in compressed format, the additional cost will be paid by the party requesting the compressed format. The additional transcript or record requested shall be incorporated into the original transcript or record and included in the index and table of contents by the reporter or clerk if reasonably practicable, but may be prepared as a supplemental transcript or record.

(b) Form. The request for additional transcript or record, made after the filing of the notice of appeal or notice of cross-appeal, shall be in substantially the following form:

(Respondent's Attorney's Name)
Attorney for Respondent
Post Office Address
Phone Number

IN THE DISTRICT COURT OF THE ____ JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR ____ COUNTY (IN THE (PUBLIC UTILITIES COMMISSION) (INDUSTRIAL COMMISSION) OF THE STATE OF IDAHO)

(Title of original action or proceeding together with the additional designation of parties as appellant and respondent)	Case No. _____ REQUEST FOR ADDITIONAL (TRANSCRIPT) (RECORD)

TO: THE ABOVE NAMED APPELLANT(S) (CROSS-APPELLANT(S)) AND THE PARTY'S ATTORNEY, AND THE (REPORTER) (CLERK) OF THE ABOVE ENTITLED (COURT) (ADMINISTRATIVE AGENCY)

NOTICE IS HEREBY GIVEN, that the Respondent (Cross-Respondent) in the above entitled proceeding hereby requests pursuant to Rule 19, I.A.R., the inclusion of the following material in the reporter's transcript or the (clerk's) (agency's) record in addition to that required to be included by the I.A.R. and the notice of appeal:

1. Reporter's transcript:

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e.g. (The entire reporter's standard transcript as defined in rule 25 (a), I.A.R.)
(The entire reporter's standard transcript supplemented by the following:)
(Voir dire examination of jury)
(Closing arguments of counsel)
(The following reporter's partial transcript:)
(The testimony of witness "X")
(Conferences on requested instructions)
(Instructions verbally given by court)

2. Clerk's or Agency's Record:

e.g. (Affidavit of "X")
(Plaintiff's requested instructions)
(Notice to take deposition of "Y")

3. I certify that a copy of this request was served upon the (reporter) (clerk) of the district court or administrative agency and upon all parties required to be served pursuant to Rule 20. (and upon the attorney general of Idaho pursuant to Section 67-1401(1), Idaho Code.)

Dated this ____ day of ____, 19__.

/s/ Attorney's Signature

_____

(Name of Attorney or Firm for Respondent)
Attorneys for the Respondent

(When certification is made by a party instead of the party's attorney the following affidavit must be executed.)

State of Idaho
County of ____ ss.

_____ being sworn, deposes and says:

That the party is the (appellant) (cross-appellant) in the above-entitled request and that all statements in this request are true and correct to the best of his or her knowledge and belief.

_____

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Signature of (Appellant)
(Cross-Appellant)

[Adopted March 25, 1977, effective July 1, 1977; amended March 20, 1985, effective July 1, 1985; amended June 15, 1987, effective November 1, 1987; amended March 26, 1992, effective July 1, 1992.]

Rule 20. Filing and service of documents. — A notice of appeal or notice of cross-appeal from a district court or an administrative agency, a petition for rehearing, and a petition for review to the Supreme Court are not deemed filed until they are physically received by the clerk of the respective court or administrative agency. For the purpose of filing all other documents involved in the appellate process, and for the purpose of service of all documents upon parties to an action, including service of a copy of a notice of appeal, a petition for rehearing or a petition for review, if the document is transmitted by mail such filing and service shall be deemed complete upon mailing. A certificate of mailing signed by an attorney that a document was properly mailed in the United States mail with postage prepaid to named persons on a day certain shall create a rebuttable presumption that such mailing was so made. At the time of the filing of a notice of appeal or cross-appeal, the appellant or cross-appellant shall serve copies thereof upon all persons who were parties and who appeared in the proceedings below, whether or not they are parties to the appeal. At the time of he filing of any other document in the appellate process, the party filing the same shall serve a copy thereof upon all other parties to the action who are parties to the appeal, or who were parties in the proceeding below and who could be affected by the appeal; provided, if the parties to be served are numerous or cannot be found the trial court may order substituted service by publication, or otherwise, upon motion of the serving party. The party shall certify such service and the date

and manner of service on the original document filed. [Adopted March 25, 1977, effective July 1, 1977; amended March 20, 1985, effective July 1, 1985; amended March 28, 1986, effective July 1, 1986; amended June 15, 1987, effective November 1, 1987.]

Rule 20.1. Filing and service of documents by facsimile machine. — (a) Filing With court. An application for stay of execution of a criminal or civil judgment or a petition for review, but not the supporting memorandum or brief, may be filed with the Supreme Court by a facsimile machine process. Any other document may be filed with the Supreme Court by a facsimile machine process when there is an emergency and when orally approved by the office of the clerk of the court in advance of filing. The clerk shall file stamp the facsimile copy as an original and the signature on the copy shall constitute the required signature under Rule 11.1. When a brief or memorandum is thereafter filed in support of a document filed by the facsimile process, each copy of the brief or memorandum shall have attached to it a copy of the motion, application or petition which was filed by the facsimile process. Filings may be made with the Supreme Court only during normal working hours. Provided, documents over ten (10) pages in length cannot be filed by the facsimile machine process.

(b) Service of Documents. Service of a document which has been filed with the Supreme Court by facsimile process may be made upon an attorney by transmitting a copy to the office of the attorney by a facsimile machine process. Provided, this rule shall not require a facsimile machine to be maintained in the office of an attorney. [Adopted November 15, 1989, effective January 1, 1990.]

Rule 21. Effect of failure to comply with time limits. — The failure to physically file a notice of appeal or notice of cross-

appeal with the clerk of the district court or an administrative agency, or the failure to physically file a petition for rehearing with the clerk of the Supreme Court, each within the time limits prescribed by these rules, shall be jurisdictional and shall cause automatic dismissal of such appeal or petition, upon the motion of any party, or upon the initiative of the Supreme Court. Failure of a party to timely take any other step in the appellate process shall not be deemed jurisdictional, but may be grounds only for such action or sanction as the Supreme Court deems appropriate, which may include dismissal of the appeal. [Adopted March 25, 1977, effective July 1, 1977; amended April 18, 1983, effective July 1, 1983.]

Rule 22. Computation of time. — In computing the time period prescribed or allowed for the filing or service of any document in these rules, the day of the act or event after which the designated period of time begins to run is not to be included, but the last day of the period so computed is to be included unless it is a Saturday, Sunday or a non-judicial day, as defined in Section 1-1607, Idaho Code, in which event the period runs until the end of the next day which is neither a Saturday, Sunday or a non-judicial day as defined in Section 1-1607, Idaho Code. [Adopted March 25, 1977, effective July 1, 1977.]

Rule 23. Filing fees and clerk's certificate of appeal — Waiver of appellate filing fee. — (a) Filing Fees. The Clerk of the Supreme Court shall charge the following filing fees for appeals and petition:

	Filing Fee
(1) Appeals in civil cases except for habeas corpus and post-conviction relief	$ 84.00

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		Filing Fees
(2)	Appeals from the Public Utilities Commission	$ 84.00
(3)	Appeals from the Industrial Commission	$ 84.00
(4)	Any cross-appeals in the appeals set out in (1), (2) and (3) above	$ 84.00
(5)	Applications to intervene	$ 84.00
(6)	Petitions for a special writ under the original jurisdiction of the Supreme Court except for habeas corpus	$ 74.00
(7)	Petitions for rehearing except in criminal actions, or actions for habeas corpus or post-conviction relief	$ 69.00
(8)	Appeals in criminal cases	$ None
(9)	Petitions for writ of habeas corpus	$ None
(10)	Petitions for post-conviction relief	$ None
(11)	Petition for review of a decision of the Court of Appeals	$ None

(b) Collection and Transmittal to the Clerk of the Supreme Court. The Clerk of the Supreme Court shall charge and collect the appropriate fee for any petitions initially filed with the Supreme Court. Upon the filing of a notice of appeal, or notice of cross-appeal, the clerk of the district court or administrative agency where the document is filed shall charge and collect the

appropriate filing fee and the clerk shall forthwith forward a certified copy of the notice of appeal together with the filing fee to the Clerk of the Supreme Court; provided, an administrative agency may forward the filing fee to the Clerk of the Supreme Court with the Certificate of Appeal. The Clerk of the Supreme Court shall forward all such fees to the state treasurer for deposit in the appropriate fund.

(c) Waiver of Appellate Filing Fee. Any appellate filing fee set forth under subsection (a) of this rule may be waived pursuant to section 31-3220, Idaho Code, if such waiver is approved by the Supreme Court. Any party desiring waiver of the appellate filing fee in a civil appeal shall first make application to the district court or administrative agency from which the appeal is taken in accordance with the rules of procedure adopted by the judicial district of the district court or the administrative agency from which the appeal is taken. The order of the district court or administrative agency recommending waiver or no waiver of the appellate filing fee shall be filed by the appellant with the notice of appeal. The appellant shall also file with the notice of appeal a verified petition, motion or affidavit sworn to be the appellant stating:

(1) The name and address of the applicant.

(2) A request for the waiver of the appellate filing fee.

(3) A statement of the factual basis showing the indigency of the applicant to pay such filing fee.

(4) A certification by the applicant that the applicant believes that the applicant is entitled to waiver of the filing fee.

(d) Request for Waiver. All of said documents filed with the district court with the notice of appeal requesting a waiver of the appellate filing fee shall be forwarded by the clerk of the district court to the Supreme Court at the same time and with the notice of appeal. The Clerk of the Supreme Court, upon receiving the notice of appeal and the request for the waiver of the appellate filing fee shall mark all documents as "lodged" indicating the date and time received. The Supreme Court will rule upon the request for waiver of the appellate filing fee without further briefs or arguments unless otherwise ordered by the Court. If the Supreme Court grants the waiver of the appellate filing fee, it will enter an order to that effect and the Clerk of the Court shall thereupon file the notice of appeal and all other documents relating to the waiver of the appellate filing fee which shall be deemed filed on the date and time they were initially lodged with the Supreme Court. In the event the Supreme Court denies the waiver of the appellate filing fee the Clerk shall so notify the appellant and the notice of appeal and all documents relating to the waiver of the appellate filing fee shall be lodged with the Supreme Court but not filed, and no appeal shall be pending with the Supreme Court unless and until the appellate filing fee is paid by the appellant. Provided, in any appeal in which the appellant or cross-appellant is represented by the Idaho Legal Aid program, the appellate filing fee shall automatically be waived and the clerk of the district court and the Clerk of the Supreme Court shall accept the notice of appeal or notice of cross-appeal without the payment of the appellate filing fee.

(e) Certificate of Appeal. The clerk of the district court or the administrative agency shall, within 14 days from the filing of the notice of appeal or cross-appeal, prepare and file with the Clerk of the Supreme Court a Certificate of Appeal in the form provided by these rules.

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(f) Form of Certificate of Appeal. The Certificate of Appeal made by the clerk of the district court or administrative agency for filing with the Supreme Court shall be in the following form:

IN THE DISTRICT COURT OF THE ____ JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR ____ COUNTY (IN THE (PUBLIC UTILITIES COMMISSION) (INDUSTRIAL COMMISSION) OF THE STATE OF IDAHO)

(Title of original action or proceeding together with additional designation of parties as appellant and respondent)

Supreme Court No. ____
CLERK'S CERTIFICATE OF APPEAL

Appeal from: _____ Judicial District
_____ County. Honorable
_____ presiding. (Public Utilities Commission) (Industrial Commission) presiding. _____

Case number from court or agency: _____
(Date and Description)
Order or judgment appealed from: _____
_____
Attorney for Appellant: _____
Attorney for Respondent: _____
Appealed by: _____
Appealed against: _____
Notice of Appeal filed: _____ (date) _____
Amended Notice of Appeal filed: _____ (date) _____
Notice of Cross-Appeal filed _____ (date) _____
Amended Notice of Cross-Appeal filed: ___ (date) _____

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Appellate fee paid: _(date and amount) __(none-explanation) _
Respondent or Cross-Respondent's request for additional record filed: _____(date) _____
Respondent or Cross-Respondent's request for addition reporter's transcript filed: _____(date) _____
Was District Court Reporter's transcript requested? _____
If so, name of reporter: _____

Dated _____

_____
Clerk of the
(District Court)
Secretary of the
(Public Utilities Commission)
(Industrial Commission)

[Adopted March 25, 1977, effective July 1, 1977; amended April 11, 1979, effective July 1, 1979; amended December 27, 1979, effective July 1, 1980; amended April 3, 1981, effective July 1, 1981; amended March 24, 1982, effective July 1, 1982; amended March 30, 1984, effective July 1, 1984; amended March 20, 1985, effective July 1, 1985; amended June 15, 1987, effective November 1, 1987; amended March 30, 1988, effective July 1, 1988; amended April 5, 1990, effective July 1, 1990; amended April 28, 1983, effective July 1, 1993.]

Rule 24. Reporter's transcript — Number — Estimate of fees — Payment to clerk in trust — Time for preparation — Waiver of reporter's fee. — (a) Number and Use of Transcripts. The reporter shall prepare an original and four copies of the reporter's transcript, except if a reporter's transcript has already been prepared for the appellant and/or respondent in an Idaho Public Utilities Commission appeal, additional copies need not be made for the party or those parties and fewer than four copies may

be made for the party or those parties and fewer than four copies may be made all of which shall be lodged with the trial court or administrative agency as provided by Rule 24(d). One copy shall be for the appellant and one copy shall be for the respondent. If there are multiple parties, they shall determine by stipulation which party shall be served with the transcript by the clerk and the manner and time of use of the transcript by each party. In the absence of such stipulation the determination shall be made by the trial court agency upon the application of any party or the clerk. Any party may also request and pay for an additional or separate copy of the transcript from the reporter.

(b) Estimate of Reporter's Fees — Filing. Upon the conclusion of any trial in the district court, or proceeding in an administrative agency, the reporter shall estimate the cost of preparing a transcript of the trial or proceeding and shall certify the amount thereof in writing which shall be delivered to the clerk and filed in the file of the action or proceeding. In the event the reporter fails to so estimate the fees for a transcript within two (2) days from the conclusion of the trial or proceeding, the estimated fees for preparation of the transcript shall be deemed to be the sum of $100.00, unless the reporter shall thereafter file the reporter's estimated fees before the filing of a notice of appeal; provided, the reporter's estimated fee may be included in the minute entry of the hearing or proceeding or stamped or endorsed thereon.

(c) Payment of Estimated Reporter's Fees to Clerk. Before filing a notice of appeal, a party to a trial in the district court or a proceeding in the Public Utilities Commission must first serve a copy of the notice of appeal on the reporter, which may be made by mail to the reporter at the resident chambers of the reporter's judge or the office of the clerk of the Public Utilities commission addressed to the reporter; and the appealing party shall pay to the

clerk of the district court the estimated fees for the preparation of any requested transcript in the amount determined under subparagraph (b) of this rule. After the estimated transcript fees are paid to the clerk of the district court, the clerk shall hold the same in trust and pay the same to the reporter upon the lodging of the completed transcript by the reporter. The payment of the reporter's fee in appeals from the Industrial Commission or Public Utilities Commission shall be as ordered by the respective Commission.

(d) Time for Preparation of Transcript. The reporter of any trial or proceedings shall prepare and lodge with the district court or with the administrative agency the requested transcript within 42 days from the date of filing of the first notice of appeal. An extension of time for the preparation and lodging of the transcript may be obtained by the reporter only by order of the Supreme Court.

(e) Waiver of Reporter's Fee. The payment of the reporter's fee as required by this rule may be waived by the district court pursuant to section 31-3220, Idaho Code, in accordance with the local rules of the judicial district of the district court. [Adopted March 25, 1977, effective July 1, 1977; amended March 31, 1978, effective July 1, 1978; amended December 27, 1979, effective July 1, 1980; amended April 18, 1983, effective July 1, 1983; amended March 30, 1984, effective July 1, 1984; amended June 15, 1987, effective November 1, 1987.]

Rule 25. Reporter's transcript — Contents. — the reporter's transcript shall contain those portions of the record designated by the parties in conformance with and as defined in this rule.

(a) Standard Transcript. If any party requests the reporter's

"standard transcript," the transcript shall include all of the testimony and proceedings reported by the reporter in the trial of the action or proceeding except the following which shall not be included in a standard transcript:

(1) The voir dire examination of the jury.

(2) The opening statements and closing arguments of counsel.

(3) Exhibits admitted in evidence, but not read into the record.

(4) The conference on requested instructions, the objections of the parties to the instructions, and the court's rulings thereon.

(5) The oral presentation by the court of written instructions given to the jury by the court and reported by the reporter.

(6) All hearings and proceedings which were heard by the trial court at some time other than during the course of the trial.

(7) In criminal appeals in which the death penalty was imposed, all hearings and proceedings held in the trial court of every nature and description.

(b) Supplemented Transcript. Any party may request that a standard transcript as defined in subparagraph (a) above, be supplemented by the addition of any of the items expressly excluded therefrom by subparagraphs (a)(1), (2), (4), (5) and (6) above. Any request for additional and supplemental portions of the transcript shall be specifically and individually identified in the notice of appeal notice of cross-appeal or request for additional reporter's transcript under Rule 19.

(c) Partial Transcript. The "partial transcript" shall consist of any portion of the reporter's transcript specified by the parties and contain those portions of the testimony and proceedings specifically designated in the notice of appeal, notice of cross-appeal, or request for additional reporter's transcript under Rule 19.

(d) Depositions or Statements. Depositions or statements which are red into the record shall be reported by the reporter and shall be included in the reporter's standard transcript or when specifically requested in the notice of appeal, notice of cross-appeal or request for additional reporter's transcript. Depositions or statements which are admitted as exhibits in evidence but not read into the record, and depositions or statements which are not read into the record but which are considered by the court in the trial of the action or by an administrative agency in a proceeding, or in connection with any motion in the action or proceeding, shall not be included in the reporter's transcript, but shall be included in the clerk's or agency's record if specifically requested therein pursuant to Rules 19 or 28(b).

(e) Written Instructions. The written requested instructions and the written instructions given by the district court in an action shall not be included in the reporter's transcript but shall be included in the clerk's record if specifically requested pursuant to Rules 19 or 28(b).

(f) Pre-Trial or Post-Trial Proceedings. Transcripts of pre-trial or post-trial proceedings shall not be included in the reporter's transcript unless specifically designated and requested as provided in subparagraphs (b) or (c) of this rule.

(g) Recorded Testimony. Any recorded testimony offered

into evidence by an audio recording or audio-visual recording and played during the proceedings shall be reported by the reporter and included in the reporter's standard transcript in the same manner as other testimony of the trial or hearing. [Adopted March 25, 1977, effective July 1, 1977; amended March 31, 1978, effective July 1, 1978; amended March 30, 1984, effective July 1, 1984; amended March 20, 1985, effective July 1, 1985; amended June 15, 1987, effective November 1, 1987.]

Rule 26. Preparation and arrangement of reporter's transcript. (a) Preparation of Transcript. The reporter's transcript shall be clearly and legibly typed on white unglazed paper 8 1/2 inches by 11 inches in size and not so thin as to affect the easy reading thereof. At the request of the party ordering the transcript, the non-ordering party, or the appellate court, the reporter's transcript must be prepared in compressed format as described in Rule 26(c). Whenever any party requests the transcript in compressed format, the reporter shall produce all copies in the same format including the copies provided to the court, in lieu of the standard format transcript. Copies of the transcript may be reproduced by any reproduction process which produces a clear and legible copy on untreated paper.

(b) Arrangement and Form. The first page and cover page of all transcripts shall state the title of the Supreme Court and the title of the action in the district court or administrative agency below, with the names and proper designation of the parties. Below this title shall be stated the title of the district court or administrative agency appealed from, the name of the presiding judge or chairman, and the names of the attorneys for the parties to the appeal. Each page of the reporter's transcript shall be numbered consecutively at the bottom in the center of the page. The type shall be 10 characters to the inch and the lines of each page shall be

double spaced with 25 lines to the page. Each line shall be numbered on the left margin. Quotations, citations and parenthetical notes may be single-spaced. All indentations for paragraphing and "Q" and "A" shall be seven spaces, with subsequent lines extended to the left margin. Each volume of the transcript shall contain no more than 300 pages unless the transcript can be completed in 350 pages. Each page, after the title page, shall contain in the lower righthand corner thereof on the line of the page number the surname of the witness, unless there be more than one witness having the same surname, then the initials also, of the witness whose testimony is there set forth. There shall be a notation indicating whether the witness was called by the plaintiff or the defendant, designated "PLF" for plaintiff, "Dft" for the defendant, and "St" for the state, and whether for direct or cross-examination, designated by "Di" for direct and "X" for cross-examination.

(c) Compressed Transcript. Upon a request for a compressed format transcript, the reporter shall prepare the transcript in the same arrangement as specified in Rule 26(b), but in a format which results in no more than 12 pages of regular transcript on one page of compressed transcript, using both the front and back of each page, and having no more than three columns of text on a page. The compressed transcript shall retain an identification of page and line numbers, and shall use a type face which is easily read. A reporter's transcript prepared in compressed format shall be bound in a spiral binding similar to briefs, and all volumes of the compressed transcript may be bound together, up to a maximum of 200 pages.

(d) Margins. There shall be a left margin sufficient that the binding of the pages will not interfere with the reading, but in no event greater than 1 1/2 inches wide. The right margin shall be of such width that a writing block of not less than 6 1/2 inches is maintained.

(e) Cover and Index. Transcripts shall be bound with substantial, stiff covers of cardboard, acetate, or other equivalent covers, fastened at the left edge so as to open as flat as possible. The reporter's transcript shall report the trial or proceedings chronologically. Each volume of the reporter's transcript must be indexed with a complete index in alphabetical order showing the volume, page and line where the types of examination of each witness (e.g. direct, cross, etc.) are commenced and indicating where all exhibits are marked, offered, admitted or rejected.

(f) Certificate of Reporter. At the end of the reporter's transcript, the reporter preparing the transcript shall certify that the reporter was the reporter of the trial or proceeding, or that the reporter was designated by the district court, agency, or Supreme Court to transcribe the proceedings, and that the transcript is a true and accurate report of such trial or proceeding to the best of the reporter's ability, and that the transcript contains all of the material designated in the notice of appeal, or any of cross-appeal, and any request for additional transcripts which have been served upon the reporter.

(g) Transcripts on Appeal from the Public Utilities Commission. On appeal from the public utilities commission, the reporter may file transcripts complying with the public utilities commission's rules for preparation of transcripts so long as the first page and cover page of all such transcripts state the title of the Supreme Court and the title of the proceeding in the public utilities commission below, with the names and proper designation of the parties. [Adopted March 25, 1977, effective July 1, 1977; amended March 30, 1984, effective July 1, 1984; amended March 26, 1992, effective July 1, 1992.]

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Rule 26.1. Computer-searchable disks of transcripts. — (a) Ordering Disks. If a written transcript is requested, any party may request computer-searchable disks of some or all of the written transcript. The request for a disk must be filed with the district court and served upon the reporter within fourteen (14) days after the filing of the notice of appeal or within fourteen (14) days after the filing of notice of cross-appeal. The request for disks shall not eliminate written transcripts as required by these rules.

(b) Preparation and Service of Disks. The reporter shall provide disks of the entire transcript unless a partial transcript is requested by a party . The disks shall be in standard ASCII code unless otherwise agreed by the reporter and the party ordering the disks. The reporter shall serve the disks on the parties requesting them within fourteen (14) days after service of the written transcripts on the parties. Each disk shall be labeled with the case title and number of the case. Each disk also must be individually labeled to show its position in the sequence of disks, the pages of the written transcript contained on the disk and the date of the proceedings contained on the disk. (e.g. disk 5 of 7, transcript pages 1251-1449, heard September 10, 1990.) The complete set of disks must be accompanied by a written index showing the case name, case number, disk name, dates of the hearings, disk number, and volume and page numbers.

(c) Copies of Disks for Court. If any party requests disks, the reporter shall prepare and file with the Supreme Court duplicate disks in standard ASII code within fourteen (14) days after filing the written transcripts. The parties shall pay the cost of such computer-searchable disks filed with the Supreme court, as provided in subsection (d) of this rule.

(d) Charges for Disks. Reporters may charge and receive the

sum of $.25 per transcript page for disks requested by a party; provided, the reporter shall receive the sum of $7.50 per disk for the disks filed with the Supreme Court as required by subsection (c) of this rule. The estimated charges for the disks shall be based upon the estimate of the transcript filed by the reporter under Rule 24(b) and shall be paid by the requesting party to the clerk of the district court for the benefit of the reporter when the request is filed with the court. The charges shall be adjusted by the reporter and the party making the request when the actual number of pages of transcript has been determined. The charges for the disks to be filed with e Supreme Court under subsection (c) of this rule shall be paid to the clerk of the district court by the first party requesting such disks. [Adopted March 20, 1991, effective July 1, 1991.]

Rule 27. Clerk's or agency's record — Number — Clerk's fees — Payment of estimated fees — Time for preparation — Waiver of clerk's fee. — (a) Number and Use of Record. The clerk of the district court or agency shall prepare five copies of the clerk's or agency's record. Three copies shall be filed with the Supreme court as provided by Rule 29. One copy shall be provided to the appellant and one copy shall be provided to the respondent. If there are multiple parties, they shall determine by stipulation which party shall be served with the record by the clerk and the manner and time of use of the record by each party. In the absence of such a stipulation, the determination shall be made by the district court or agency upon the application of any party or the clerk. Any party may also request and pay for an additional separate copy of the record from the clerk.

(b) Clerk's Fee. The clerk of the district court shall charge and collect a fee for the preparation of the record in the sum of $1.25 for each page of the record. Such fee shall be full payment for five complete copies of the record. Any party may obtain an additional

copy of the record for the charge of $.50 per page. The clerk of an administrative agency shall charge such sum, in any, as ordered by the administrative agency.

(c) Payment of Estimated Fees. Before a notice of appeal is filed, the appellant shall pay the clerk an estimated record fee as computed by the clerk of the district court or administrative agency in accordance with subparagraph (b) of this rule above.

(d) Time for Preparation. The clerk of the district court or an administrative agency shall prepare the clerk's or agency's record within 42 days from the date of filing of the first notice of appeal provided that in the event the reporter's transcript is completed before 56 days after the filing of the notice of appeal, the clerk's or agency's record shall be prepared no later than 14 days after the reporter's transcript is lodged with the clerk of agency. If no transcript is requested, then the clerk's or agency's record shall be prepared no later than 21 days after the filing of the first notice of appeal. The clerk shall retain the copies of the clerk's or agency's record until the reporter's transcript, if any, is finished and thereafter cause the same to be settled and forwarded to the Supreme Court as provided by Rue 29. An extension of time for preparation of the record may be obtained only by order of the Supreme Court.

(e) Waiver of Clerk's Fee. The payment of the clerk's record fee as required by this rule may be waived by the district court pursuant to section 31-3220, Idaho Code, in accordance with the local rules of the judicial district of the district court. [Adopted March 25, 1977, effective July 1, 1977; amended March 31, 1978, effective July 1, 1978; amended December 27, 1979, effective July 1, 1980; amended March 24, 1982, effective July 1, 1982; amended March 20, 1985, effective July 1, 1985.]

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Rule 28. Preparation of clerk's or agency's record — Content and arrangement. — (a) Content — Automatic Inclusion. The clerk's or agency's record shall automatically include the following pleadings and documents, including the following pleadings and documents filed in the magistrates division:

(1) In civil cases and proceedings, unless limited by designation in the notice of appeal or amended notice of appeal.:

A. The original and any amended complaint or petition.

B. The original and any amended answer or response to the complaint or petition.

C. The original and any amended counterclaim, third party claim, or cross-claim.

D. The original and any amended answer or response to a counterclaim.

E. Any motions to dismiss or motions for summary judgment and attachments or affidavits in support or in opposition to the motion, but not briefs or memorandum.

F. Orders granting or denying motions to dismiss or motions for summary judgment.

G. Pre-trial orders.

H. The jury verdict rendered in a jury trial.

I. The findings of fact and conclusions of law and any memorandum decision entered by the court.

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J. All judgments and decrees.

K. All court minutes.

L. Certificate listing all exhibits offered, whether or not admitted.

M. Notice of appeal and any notice of cross-appeal.

N. Any request for additional reporter's transcript or clerk's record.

O. Table of contents and index, which shall be placed at the beginning of the record.

(2) In criminal cases and proceedings.

A. All complaints, informations, and indictments.

B. Order of commitment for trial and related documents in felony cases.

C. Any motion made by either the state or the defendant and the order of the court rendered in respect thereto.

D. The jury verdict.

E. The judgment or order withholding judgment.

F. Order of sentence.

G. All court minutes.

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H. Certificate listing all exhibits offered, whether or not admitted.

I. Notice of appeal and any notice of cross-appeal.

J. Any request for additional reporter's transcript or clerk's record.

K. Table of contents and index.

L. In criminal appeals in which the death penalty was imposed, all documents in the trial court file of every nature, kind and description, except that the presentence investigation report shall be forwarded as an exhibit to the record.

(3) In administrative proceedings:

A. Any original or amended complaint, petition, application or other initial pleading.

B. Any answer or response thereto.

C. All documents relating to an application or petition to intervene.

D. Any protest or other opposition filed by a party.

E. Certificate listing all exhibits offered, whether or not admitted.

F. The findings of fact and conclusions of law, or if none, any memorandum, decision entered by the agency.

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G. The final decision, order of award.

H. Petitions for rehearing or reconsideration and orders thereon.

I. Notice of appeal and any notice of cross-appeal.

J. Any request for additional reporter's transcript or agency's record.

K. Table of contents and index.

(b) Additional Documents. The clerk's or agency's record shall also include all additional documents requested by any party in the notice of appeal, notice of cross-appeal and requests for additional documents in the record. Any party may request any written document filed with the district court or agency to be included in the clerk's or agency's record including, but not limited to, written requested jury instructions, written jury instructions given by the court, depositions, statements or affidavits considered by the court or administrative agency in the trial of the action or proceeding, or considered on any motion made therein, and memorandum opinions or decisions of a court or administrative agency. Provided, any party requesting a deposition to be made part of the clerk's or agency's record may alternatively request that the original deposition be filed as an exhibit pursuant to Rule 31, in which event it shall not be necessary to attach copies of the deposition to any copy of the clerk's or agency's record.

(c) Preparation of Record. The clerk shall prepare the record on paper making clearly and distinctly legible photocopies or other reproductions of all documents included in the record. The clerk shall type or have typed any document which cannot be reproduced in a distinctly legible form.

(d) Cover of Record. The clerk's or agency's record shall be bound with a cover of 65 pound paper stock or heavier material and shall not have a plastic or acetate cover. The record shall be fastened at the top edge so as to open as flatly as possible.

(e) Arrangement and Numbering. All pleadings, documents, and papers required to be in the clerk's or agency's record shall be inserted chronologically as indicated by the date filing. Each page of the clerk's or agency's record shall be numbered consecutively at the bottom of the page and the name of the document shall be at the bottom of each page. Each volume of the clerk's or agency's record shall contain no more than 300 pages unless the record can be completed in 350 pages.

(f) Table of Contents and Index of Record. Each volume of the clerk's or agency's record shall contain a chronological table of contents of the documents included in the entire record and shall have an alphabetical index indicating the volume and page where each pleading, document or paper may be found.

(g) Certificate of Clerk. The clerk of the court or administrative agency shall certify at the end of the record, that the record contains true and correct copies of all pleadings, documents and papers designated to be included in the clerk's or agency's record by Rule 28, the notice of appeal, any notice of cross-appeal, and any destination of additional documents to be included in the clerk's or agency's record.

(h) Certificate of Service. The clerk shall certify in the record, or in the clerk's certificate, the date of service of the record and the transcript on the parties or their counsel. [Adopted March 25, 1977, effective July 1, 1977; amended December 27, 1979, effective July 1, 1980; amended March 24, 1982, effective July 1,

1982; amended March 20, 1985, effective July 1, 1985; amended June 15, 1987, effective November 1, 1987; amended March 27, 1989, effective July 1, 1989; amended March 26, 1992, effective July 1, 1992.

Rule 29. Settlement and filing of reporter's transcript and clerk's or agency's record. — (a) Settlement of Transcript and Record. Upon the completion of the reporter's transcript, the reporter shall lodge the original and all copies with the clerk of the district court or administrative agency. Upon the receipt of the reporter's transcript and upon completion of the clerk's or agency's record, the clerk of the district court or administrative agency shall serve copies of the reporter's transcript and clerk's or agency's record upon the parties by serving one copy of the transcript and record on the appellant and one copy of the transcript and record on the respondent. In all appeals from criminal prosecutions and post-conviction relief petitions service shall be made upon the attorney general of the state of Idaho, as representative of the state. Service may be by personal delivery or by mail. If service is made by mail it shall be accompanied by a certificate indicating the date of mailing If there are multiple parties appellant or respondent the clerk shall mail or deliver a notice of the lodging of the reporter's transcript and clerk's or agency's record to all attorneys or parties appearing in person, stating that the transcript and record have been lodged, and further stating that the clerk will serve the same upon the parties upon receipt of a stipulation of the parties, or order of the district court or administrative agency, as to which parties shall be served with the transcript and record. The parties shall have 21 days from the date of the service of the transcript and the record within which to file objections to the transcript or the record, including requests for corrections, additions or deletions. In the event no objections to the reporter's transcript or clerk's or agency's record are filed within said 21-day time period, the transcript and record shall be deemed settled. Any objection made

to the reporter's transcript or clerk's or agency's record must be accompanied by a notice setting the objection for hearing and shall be heard and determined by the district court or administrative agency from which the appeal is taken. After such determination is made, the reporter's transcript and clerk's or agency's record shall be deemed settled as ordered by the district court or administrative agency. The reporter's transcript and clerk's or agency's record may also be settled by stipulation of all affected parties.

(b) Filing Transcript and Record with Supreme Court. Upon settlement of the reporter's transcript and clerk's or agency's record, the clerk of the district court or administrative agency shall, within seven (7) days, filed the original and two copies of the reporter's transcript and three copies of the clerk's or agency's record with the Clerk of the Supreme Court. The Clerk of the Supreme Court shall notify all attorneys of record, or parties appearing in person, of the date of such filing. Such notification shall also state when the briefs of the parties are required too be filed. [Adopted March 25, 1977, effective July 1, 1977; amended March 31, 1978, effective July 1, 1978; amended March 30, 1984, effective July 1, 1984.]

Rule 30. Augmentation or deletions from transcript or record .— Any party may move the Supreme Court to augment or delete from the settled reporter's transcript or clerk's or agency's record. Such a motion shall be accompanied by a statement setting forth the specific grounds for the request and attaching a copy of any document sought to be augmented, which document must have a legible filing stamp of the clerk indicating the date of its filing. The motion and statement shall be served upon all parties. Any party may within fourteen (14) days after service of the motion, file a brief or memorandum in opposition thereto. Unless otherwise expressly ordered by the Supreme Court such motion shall be

determined without oral argument. The reporter's transcript and clerk's or agency's record may also be augmented or portions deleted by stipulation of the parties and order of the Supreme Court. Any motion for augmentation and any response thereto shall be filed with the Clerk of the Supreme Court with the number of copies specified in Rule 32(e). The filing of a motion to augment shall not suspend or stay the appellate process or the briefing schedule. [Adopted March 25, 1977, effective July 1, 1977, amended March 31, 1978, effective July 1, 1978; amended April 11, 1979, effective July 1, 1979; amended March 20, 1985, effective July 1, 1985; amended March 26, 1992, effective July 1, 1992.]

Rule 30.1. Corrections of transcript or record. — (a) By Stipulation. At any time after the filing of a transcript or record with the Supreme Court the parties may, by stipulation filed with the Court, correct any statement in the transcript or record. The stipulation shall clearly identify the volume, page and line of the statement to be corrected, and upon filing with the Court the clerk shall attach the stipulation to the transcript or record and no order of the Court shall be necessary.

(b) By Motion. Any party to an appeal may file a motion for the correction of a statement in a transcript or record filed with the Supreme Court by filing a motion in accordance with Rule 32. The Supreme Court may rule upon the motion directly or may refer that portion of the transcript or record to the trial court or administrative agency for settlement, in which case the ruling of the trial court or agency shall be final. [Adopted March 20, 1985, effective July 1, 1985.]

Rule 31. Exhibits, recordings and documents. — (a) Lodging with Supreme Court. The clerk of the district court or

administrative agency shall lodge all of the following exhibits, recordings and documents with the Supreme Court:

(1) All documents, x-rays, charts and pictures offered or admitted as exhibits in a trial or hearing; provided, all other exhibits shall be retained by the clerk of the district court or administrative agency, unless otherwise ordered by the Supreme Court; provided, further, in death penalty cases the clerk shall forward to the Supreme Court all exhibits offered or admitted, unless otherwise ordered by the Supreme Court.

(2) All records and transcripts filed with the district court or administrative agency.

(3) All transcripts from the magistrate's division of the district court.

(4) All audio and audio-visual recordings offered or played during the proceedings.

(b) Presentence Reports. Except as otherwise provided by law as in capital cases, the clerk of the district court shall not lodge any presentence report with the Supreme Court in the appeal of a criminal action unless requested by a party or ordered by the Supreme Court.

(c) Certificate of Clerk of Secretary. The clerk, secretary, or the officer responsible for collecting exhibits offered or admitted at the trial or hearing shall file a certificate with the Supreme Court certifying the exhibits, recordings and documents which have been lodged with the Supreme Court, and listing and describing those exhibits which are retained by the clerk or secretary.

(d) Time for Lodging. Unless otherwise directed by the Supreme Court, the above exhibits, recordings and documents shall be lodged with the Supreme Court at or before the time that the reporter's transcript and clerk's record are lodged with the Supreme Court.

(e) Disposition of Exhibits. Unless otherwise ordered by the Supreme Court under Rule 31.1, the Supreme Court will retain the exhibits until determination of the appeal and then return all such exhibits to the clerk of the trial court or the secretary of the administrative agency. [Adopted June 15, 1987, effective November 1, 1987; amended March 27, 1989, effective July 1, 1989.]

Rule 31.1. Reclaiming exhibits, documents or property. — At any time after the commencement of an appeal, any interested party or person may file a motion with the Supreme Court for an order permitting the reclamation by such party or person of exhibits offered or admitted in evidence, documents or property displayed or considered in connection with the action, or any property in the possession of any court, department, agency or official. The Supreme Court in its discretion may grant such an order on such conditions and under such circumstances as it deems appropriate, including but not limited to the substitution of a copy, photograph, drawing, facsimile, or other reproduction of the original exhibit, document or property, or the posting of a bond that the exhibit, document or property will be returned if either the Supreme Court or the trial court later orders that such exhibit, document or property be returned to the court for any purpose in the action or appeal. [Adopted June 15, 1987, effective November 1, 1987.]

Rule 32. Motions — Time for filing — Briefs. — (a) Motions to Dismiss. A motion for involuntary dismissal of an

appeal with prejudice for failure to comply with these rules must be filed at least 21 days before oral argument on the merits; provided, a motion to dismiss an appeal for failure to timely physically file a notice of appeal or to dismiss a petition for rehearing for failure to timely physically file a petition for rehearing may be made at any time.

(b) Voluntary Motions to Dismiss. Any appealing party may move the court to dismiss the party's appeal with prejudice at any time, before or aft er oral ar gument. The court may tax costs and attorneys fees as though the non-appealing party had prevailed.

(c) Other Motions. All other motions permitted under these rules, other than a motion to dismiss, may be made at any time, before or after oral argument.

(d) Briefs or Statements to Accompany Motions. All motions shall include or be accompanied by a brief, statement, or affidavit in support thereof and service shall be made upon all parties to the appeal. Any party may file a brief or statement in opposition to the motion within 14 days from service of the motion. Any application for an extension of time to perform an act under this rule must be accompanied by an affidavit setting forth the reasons or grounds in support thereof.

(e) Size and Number of Copies. All motions, notices, affidavits, statements, motion briefs, or any other documents filed with the court should be typed on 8 1/2 x 11 inch paper, but until January 1, 1985, it is permissible to use 8 1/2 x 13 inch or i 1/2 x 14 inch paper. The body of all such documents may be typed with double line spacing or one-and-one-half (1 1/2) line spacing. An original and six copies of each motion, brief, statement, affidavit or memorandum shall be filed with the clerk of the Supreme Court.

(f) Oral Argument. All motions will be considered and disposed of without oral argument unless otherwise ordered by the Supreme Court. [Adopted March 25, 1977, effective July 1, 1977; amended March 31, 1978, effective July 1, 1978; amended April 18, 1983, effective July 1, 1983; amended March 23, 1990, effective July 1, 1990.]

Rule 33. Stipulation for dismissal. — At any point the affected parties may stipulate for the dismissal of the appeal or petition which stipulation shall contain an agreement as to the taxing of costs. Any such stipulation for dismissal signed by some but not all of the parties to an appeal shall be considered and processed as a motion for dismissal under Rule 32. [Adopted March 25, 1977, effective July 1, 1977; amended March 28, 1986, effective July 1, 1986.]

Rule 33.1. Stipulation for vacation, reversal or modification of judgment. — Upon stipulation of all affected parties that a criminal or civil judgment of the trial court or administrative agency may be vacated, reversed, modified or remanded for further hearings, the court may enter an order accomplishing the stipulated result without briefs, oral argument, or an opinion of the court. An order entered by the court pursuant to such a stipulation shall not be considered as precedent for any purpose other than a resolution of that appeal. The clerk of the court shall issue a remittitur for the order under Rule 38 in the same manner as a remittitur on an opinion of the court. [Adopted March 23, 1990, effective July 1, 1990.]

Rule 34. Briefs on appeal — Number — Length — Time for filing — Service of briefs. — (a) Number of Copies. The original and nine (9) copies of all appellate briefs shall be filed with the Supreme Court and the original shall be signed by counsel submitting the same.

(b) Length of Briefs. No brief in excess of 50 pages, exclusive of any addendum or exhibit, shall be filed without consent of the Supreme Court.

(c) Time for Filing. Appellant's brief shall be filed with the clerk of the Supreme Court within 35 days of the date of notice that the reporter's transcript and the clerk's or agency's record have been filed with the Supreme Court. The respondent's and cross-appellant's brief, which may be joined in one brief, shall be filed within 28 days after the service of appellant's brief. The cross-respondent's brief, if any, shall be filed within 28 days after the cross-appellant's brief. Any reply brief shall be filed within 21 days after service of any respondent's brief. Any reply brief shall be filed within 21 days after service of any respondent's brief. Any reply brief shall be filed within 21 days after service of any respondent's brief. Briefs of amicus curiae shall be filed within the time set in the order of the Supreme Court granting leave to file an amicus brief.

(d) Service of Briefs. Two copies of all appellate briefs shall be served upon each party to the appeal.

(e) Extension of Time for Filing Brief. A motion for extension of time for filing a brief may be made no later than the due date for the appellate brief and shall be supported by an affidavit setting forth:

(1) The date when the brief is due;

(2) The number of extensions of time previously granted, and if extensions were granted the original date when the brief was due;

(3) Whether any previous requests for extensions of time have been denied or denied in part;

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(4) The reasons or grounds why an extension is necessary;

(5) The number of days of extension deemed necessary and the date on which the brief would become due;

(6) Whether there has been any stipulation of the parties for this application for extension, which stipulation shall not be binding upon the Court;

(7) The position of the opposing parties concerning the application, and whether or not the opposing parties have verbally expressed or disagreement;

(8) What assurance there is that the brief will be filed within the extended time requested.

Extensions of time for filing briefs shall not be favored and will be granted by the Supreme Court only upon a clear showing of good cause and as provided in Rule 46.

(f) Augmentation of Briefs. (1) At any time before the issuance of an opinion, any party may supplement his brief by the citation of additional authority, without written comment thereon, by written notice to the court and all parties without first obtaining leave of the court.

(2) At any time before the issuance of an opinion, any party may file a motion to augment the authority and argument presented in his brief. Such motion shall be filed in accordance with Rule 32, with or without the supplemental brief attached, and will be granted by the court upon a showing of good cause why the material had not been included in the prior brief. An order granting a motion to augment a brief will state the time within which any

reply brief of an adverse party can be filed. [Adopted March 25, 1977, effective July 1, 1977; amended April 11, 1979, effective July 1, 1979; amended April 18, 1983, effective July 1, 1983; amended March 30, 1984, effective July 1, 1984; amended March 28, 1986, effective July 1, 1986; amended June 15, 1987; effective November 1, 1987.]

Rule 35. Content and arrangement of briefs. — (a) Appellant's Brief. The brief of the appellant shall contain the following divisions under appropriate headings:

(1) Table of Contents. A table of contents, with page references, which shall include an outline of the Argument section of the brief.

(2) Table of Cases ad Authorities. A table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where they are cited.

(3) Statement of the Case. (i) A statement of the case indicating briefly the nature of the case. (ii) The course of the proceedings in the trial or the hearing below and its disposition. (iii) A concise statement of the facts.

(4) Issues Presented on Appeal. A list of the issues presented on appeal, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of the issues shall fairly state the issues presented for review. The statement of issues presented will be deemed to include every subsidiary issue fairly comprised therein.

(5) Attorney Fees on Appeal. If the appellant is claiming attorney fees on appeal the appellant must so indicate in the

division of issues on appeal that appellant is claiming attorney fees and state the basis for the claim.

(6) Argument. The argument shall contain the contentions of the appellant with respect to the issues presented on appeal, the reasons therefor, with citations to the authorities, statutes and parts of the transcript and record relied upon.

(7) Conclusion. A short conclusion stating the precise relief sought.

(b) Respondent's Brief. The brief of the respondent shall contain the following divisions under appropriate headings:

(1) Table of Contents. A table of contents, with page reference which shall include an outline of the Argument section of the brief.

(2) Table of Cases and Authorities. A table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where there are cited.

(3) Statement of the Case. A statement of the case to the extent that the respondent disagrees with the statement of the case set forth in appellant's brief.

(4) Additional Issues presented on Appeal. In the event the respondent contends that the issues presented on appeal listed in appellant's brief are insufficient, incomplete, or raise additional issues for review, the respondent may list additional issues presented on appeal in the same form as prescribed in Rule 35(a)(4) above.

(5) Attorney Fees on Appeal. If the respondent is claiming attorney fees on appeal the respondent must so indicate in the division of additional issues on appeal that respondent is claiming attorney fees and state the basis for the claim.

(6) Argument. The argument shall contain the contentions of the respondent with respect to the issues presented on appeal, the reasons therefor, with citations to the authorities, statutes and parts of the transcript and record relied upon.

(7) Conclusion. A short conclusion stating the precise relief sought.

(c) Other Briefs. The appellant or cross-appellant may file a brief in reply to the brief of the respondent or cross-respondent within the time limit specified by Rule 34(c) which may contain additional argument in rebuttal to the contentions of the respondent. An amicus curiae brief permitted by order of the Court may contain a statement of the case, points and authorities, and additional argument on any issue raised by the parties in the appeal or as allowed by order of the Supreme Court. If the respondent has filed a cross-appeal, the appellant shall file a cross-respondent's brief which shall contain all of the requirements of Rule 35(b), above.

(d) References in Briefs to Parties. Counsel will be expected in their briefs and oral arguments to keep to a minimum reference to parties by such designations as "appellant," "respondent," and "cross-appellant." To promote clarity and simplicity in the presentation of written and oral contentions of the parties to the supreme Court, the counsel shall use the designations used in the trial court or other proceedings under review, or the actual names of the parties, or descriptive terms such as the "employee," the "employer," the "landlord," etc.

(e) References in Briefs to the Reporter's Transcript and Clerk's or Agency's Record. References to the reporter's transcript on appeal shall be made by the designation "Tr" followed by the volume, page and line number abbreviated "Vol. I, p. 14, L. 16". References to the clerk's or agency's record on appeal shall be made by the designation "R" followed by the volume, page and line number abbreviated "Vol. I, p. 14, L. 16".

(f) Reproduction of Statutes, Rules, Regulations, Decisions, Etc. If determination of the issues presented on appeal requires the study of statutes, rules, regulations, recent court decisions not yet published, or relevant parts thereof, they may be reproduced in the brief or in an addendum at the end of the brief, or they may be supplied to the court in pamphlet form.

(g) Briefs in Cases Involving Multiple Parties. In cases involving more than one appellant or respondent, including cases consolidated for purposes of appeal, any number of parties to the appeal may join in a single brief, and any party may adopt by reference any part of the brief of another party. [Adopted March 25, 1977, effective July 1, 1977; amended March 31, 1978, effective July 1, 1978; amended March 20, 1985, effective July 1, 1985; amended June 15, 1987, effective November 1, 1987; amended March 27, 1989, effective July 1, 1989.]

Rule 36. Preparation of briefs. — All briefs shall be prepared in accordance with the following requirements:

(a) Cover of Brief. The cover of all briefs shall state the title of the Supreme Court, the title of the action designated on the certificate of appeal, whether it is appellant's or respondent's brief, the name of the district court or administrative agency appealed from, the name of the trial judge or chairman presiding at the trial

or hearing, and the names and addresses of all counsel of record showing for whom they appear. The information on the cover shall be substantially in the following form:

IN THE SUPREME COURT OF THE STATE OF IDAHO

JOHN DOE,
Plaintiff-Respondent (or Appellant)
v.
RICHARD DOE,
Defendant-Appellant (or Respondent)

APPELLANT'S (OR RESPONDENT'S) BRIEF

Appeal from the District Court of the _____ Judicial District for _____ County. (Appeal from the _____ Commission)

(Honorable_____, District Judge)(Chairman_____) presiding.
(Attorney's Name)
Residing at _____, for Appellant
(Attorney's Name)
Residing at _____, for Respondent.
(Clear space of at least 1 1/2 inches at bottom cover)

(b) Color and Material of Cover. The cover of appellant's brief shall be light blue, the cover of respondent's brief shall be white, the cover of appellant's reply brief shall be tan or light brown, the color of cross-appellant's reply brief shall be light yellow, and the cover of any amicus curiae or intervenor's brief shall be light green. The color of respondent's and cross-appellant's brief, when joined in one brief, shall be white. The color of appellant's reply and cross-respondent's brief, when

joined in one brief, shall be tan or light brown. The cover page must be sufficiently light in color to distinctly show the print. The cover of an appellate brief shall be 65 pound cover stock or heavier material, or a vinyl cover of equal weight, and shall not have a plastic or acetate cover.

(c) Printing and Typing Requirements of Briefs.

(1) Printed Briefs. Any printed brief shall be printed with black ink on unruled white writing paper 10 inches long by 7 inches wide with a margin on both edges of not less than 1 inch. The printed page, exclusive of any marginal note or reference shall be 9 inches long and 5 inches wide. Small pica solid or 12-point type leaded out to 16 points is the smallest letter and most compact mode of composition allowed. All lines in the brief must be double-spaced except for quotations which may be indented and single-spaced. The top and bottom margin of the cover page shall be at least 1 1/2 inches. The pages shall be numbered at the bottom and bound on the left with either saddle-back stitching, center stapling, spiral binding or plastico-type binding.

(2) Process Printed Briefs. Any process-printed brief shall be printed on unruled and untreated white paper 11 inches long by 8 1/2 inches wide. Mimeograph or stencil sheet method of reproduction shall not be permitted. The type shall be 10 characters to the inch and lines of each page must be double-spaced except for quotations which may be indented and single-spaced. The top and bottom margin in the cover page shall be at least 1 1/2 inches. The pages shall be numbered at the bottom and bound on the left with saddle-back stitching, spiral binding, or plastico-type binding. The original brief used for the process-printed brief shall be typed with black ribbon or produced by a computer or word processor type printer of letter quality on white paper.

(3) Typewritten Briefs. Typewritten briefs may be submitted only with the prior permission of the Supreme Court for good cause shown by motion and affidavit. Any typewritten brief shall be clearly and legibly typed on white unglazed 8 1/2 by 11 inch size paper of approximately 20 lbs. weight. Pica standard solid 10 letter to the inch or proportional spacing of substantially the same size and spacing is the smallest letter and most compact mode of composition allowed. Black record ribbon shall be used in the typing. Carbon copies shall not be used. Temporary reproduction methods and mimeograph or spirit duplicating are not allowed, but clearly and distinctly legible photocopies or other reproduction copies on white unglazed paper shall be permitted. There shall be a margin of 1 1/2 inches at the top and at the bottom of each page and at least 1 inch at the left side of the page. The pages shall be numbered at the bottom and fastened at the left side. The lines shall be double-spaced except where there are quotations and citations listed in the brief. [Adopted March 25, 1977, effective July 1, 1977; amended March 28, 1986, effective July 1, 1986; amended March 23, 1990, effective July 1, 1990; amended March 26, 1992, effective July 1, 1992; amended February 10, 1993, effective July 1, 1993.]

Rule 37. Oral argument. — (a) When Appeal Submitted on Briefs. There shall be oral argument in all appeals at such time and place scheduled by the Supreme Court, unless all parties stipulate to submit the appeal upon the briefs and such stipulation is approved by order of the Supreme Court.

(b) Time Allotted for Argument. Each side will be allowed 30 minutes for argument; provided, that for good cause shown the Supreme Court may extend or shorten the time. If argument is allowed on a preliminary motion, one counsel on a side will be heard and each will be allowed ten (10) minutes. The Court may

alter the procedure and shorten the time for oral argument of appeals and petitions placed upon the expedited calendar in order to provide a system of prompt and speedy hearing of all expedited appeals. If there are multiple parties, the parties on each side shall allocate the time for argument between and among themselves prior to the commencement of oral argument. In the absence of such agreement, on the request of any party at least 14 days before oral argument, an allocation of time will be made by the Supreme Court at least seven (7) days before argument. The Court may allocate the time for argument between and among co-parties or in its discretion allocate equal or unequal time for argument to each of the co-parties, or the Court may allot the full time for argument to each of the co-parties.

(c) Order of Argument. The appellant or the petitioner shall be entitled to open and close the argument; provided, in the event there are multiple parties or third parties, the Supreme Court shall determine the sequence and order of argument.

(d) Non-Appearance of Parties. If any party fails to appear for oral argument, the Court may hear the argument of any party appearing, may vacate the hearing, or may decide the appeal on the briefs. If no party appears, the case will be decided upon the briefs unless the Court orders otherwise. If counsel for a party fails to appear to present oral argument, the Supreme Court may assess penalties and sanctions including reasonable attorneys fees.

(e) Non-Filing of Brief. If no respondent's brief is filed, the appeal shall be submitted on the appellant's brief without oral argument, unless the appellant requests oral argument. Any party who has failed to file a brief shall not be permitted to present oral argument. [Adopted March 25, 1977, effective July 1, 1977; amended March 28, 1986, effective July 1, 1986.]

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Rule 38. Opinions and remittiturs. — (a) Opinions. The filing of an opinion of the Court shall be the announcement of the opinion. A certified copy of the opinion filed in an appeal or proceeding shall be mailed forthwith by the Clerk of the Supreme Court to the clerk of the district court or administrative agency from which the appeal was taken and copies of the opinion shall be mailed to each party in the appeal or proceeding and to the presiding judge or chairman of the administrative agency.

(b) Finality of Opinions. Opinions shall become final 21 days after the date of the last of the following events:

(1) The announcement of the opinion;

(2) The announcement of the opinion on rehearing;

(3) The announcement of a modified opinion without a rehearing.

(c) Remittiturs. When the opinion filed has become final in accordance wit this rule, the Clerk of the Supreme Court shall issue and file a remittitur with the district court or administrative agency appealed from and mail copies to all parties to the appeal and to the presiding district judge or chairman of the agency. The remittitur shall advise the district court or administrative agency that the opinion has become final and that the district court or administrative agency shall forthwith comply with the directive of the opinion.

(d) Costs and Attorney Fees. The taxation of costs and attorney fees, if any, shall be included in the remittitur if the same have been determined, but the issuance of the remittitur shall not be delayed if the taxation of such items has not been determined. [Adopted March 25, 1977, effective July 1, 1977.]

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Rule 39. Remittitur following mandate from the Supreme Court of the United States. — Upon receipt by the Clerk of the Supreme Court of a mandate from the Supreme Court of the United States, the Clerk shall immediately notify respective counsel in writing of such fact and the date thereof. Unless further proceedings are required in the Idaho Supreme Court, at the expiration of 21 days from said date the Clerk shall issue a remittitur to the district court in which the judgment was rendered commanding such court to take appropriate action. All of the costs subsequent to the appeal from said district court shall be taxed in such remittitur. [Adopted March 25, 1977, effective July 1, 1977.]

Rule 40. Taxation of costs. — (a) Costs to Prevailing Party. Costs shall be allowed as a matter of course to the prevailing party unless otherwise provided by law or order of the Court.

(b) Items of Costs. Costs shall, unless otherwise ordered, include the following items:

(1) Filing fees.

(2) Cost of reporter's transcript including the cost of computer-searchable disks filed with the Supreme Court under Rule 26.1(c), but excluding the cost of all other disks.

(3) Cost of clerk's or agency's record.

(4) Cost for the production of all appellant's briefs, respondent's briefs, reply briefs and briefs in support of or in opposition to petitions for rehearsing or review, including covers but excluding appendixes, at the rate of $3.00 per page.

(5) Costs of premiums of a supersedeas bond, unless he party taxed with costs had agreed in writing, within seven (7) days of the filing of the notice of appeal, not to execute pending appeal as provided in Rule 16(b).

(c) memorandum of Costs. Within 14 days of the filing and announcement of the opinion on appeal, whether or not a petition for rehearing or petition for review is filed, any party who claims costs shall file with the Court and serve upon all adverse parties a memorandum of costs, itemizing each claimed expense. A memorandum of costs mailed to the Court shall be deemed filed upon the date of mailing. Failure to file a memorandum of costs within the period prescribed by this rule shall be a waiver of the right to costs.

(d) Objections to Costs. No later than fourteen (14) days after the date of service of the memorandum of costs, any party may object to the claim for costs of another party by filing and serving on the adverse party an objection to part or all of such costs, stating the reasons in support thereof. An objection to costs shall be deemed filed upon mailing and shall be heard and determined by the Court as an objection to the application for costs.

(e) Number of Copies. An original and six copies of the memorandum of costs, objections to costs, and briefs in support of or in opposition thereof shall be filed with the Clerk of the Supreme Court.

(f) Clerk to Insert Costs in Remittitur. The Clerk of the Supreme Court shall prepare an itemized statement of costs taxed in the Supreme Court and insert the same in the remittitur. If the remittitur has been issued before the final determination of costs, or any amendment thereto, an itemized statement of costs allowed

shall be forwarded by the Clerk of the Supreme Court to the district court or administrative agency as soon as it is available and shall then be added to the judgment or order. The payment of costs on appeal shall be enforced in the district court or administrative agency as soon as it is available and shall then be added to the judgment or order. The payment of costs on appeal shall be enforced in the district court or administrative agency. [Adopted March 25, 1977, effective July 1, 1977; amended March 30, 1984, effective July 1, 1984; amended March 20, 1985, effective July 1, 1985; amended March 28, 1986, effective July 1, 1986; amended March 20, 1991, effective July 1, 1991.]

Rule 41. Attorney fees on appeal. — (a) Application for Attorney Fees — Waiver. Any party seeking attorney fees on appeal must assert such a claim as an issue presented on appeal in the first appellate brief filed by such party as provided by Rule 35(a)(5) and 35(b)(5); provided, however, the Supreme Court may permit a later claim for attorney fees under such conditions as it deems appropriate.

(b) Oral Argument on Attorney Fees. At the time of oral argument of an appeal, the parties may present argument as to whether or not the party claiming attorney fees has a legal right thereto.

(c) Adjudication of Right to Attorney Fees. The Supreme Court in its decision on appeal shall include its determination of a claimed right to attorney fees, but such ruling will not contain the amount of attorney fees allowed.

(d) Amount of Attorney Fees. If the Court determines that a party is entitled to attorney fees on appeal, the party claiming attorney fees shall file a claim concurrently with, or as part of, the

memorandum of costs provided for by Rule 40. The claim for attorney fees shall be accompanied by an affidavit setting forth the method of computation of the attorney fees claimed. Attorney fees may include the reasonable cost of automated legal research (Computer Assisted Legal Research), if the court finds it was reasonably necessary in preparing the party's case. The opposing party may object to the amount of attorney fees claimed in the same manner as provided for objections to a memorandum of costs in Rule 40. The Court shall determine the amount of attorney fees or remand this question to the district court or agency to hear additional evidence and determine the amount of attorney fees to be allowed. Upon the determination of the amount of attorney fees, the Clerk shall insert the amount thereof in the remittitur in the same manner as the Clerk inserts costs pursuant to Rule 40(f).

(e) Number of Copies. An original and six copies of the claim or memorandum for attorney fees, objections to attorney fees, and briefs in support of or in opposition thereto shall be filed with the Clerk of the Supreme Court. [Adopted March 25, 1977, effective July 1, 1977; amended March 30, 1984, effective July 1, 1984; amended March 23, 1990, effective July 1, 1990.]

Rule 42. Petition for rehearing. — (a) Time for Filing — Filing Fee. Petitions for rehearing must be physically filed with the Clerk of the Supreme Court, together with the filing fee, within 21 days after the filing date of the Court's opinion, and must be served upon all parties to the appeal or proceeding. If the opinion is modified, an aggrieved party may physically file another petition for rehearing within 21 days from the date of the modified opinion and serve all adverse parties in the appeal or proceeding. No response to any petition fro rehearing shall be made except upon direction of the Court.

(b) Briefs on the Petition. A brief or memorandum in support of the petition must be filed within 14 days of the filing date of the petition and shall be typewritten on letter size paper. An original and 9 copies of the petition and brief shall be filed with the Clerk of the Supreme Court.

(c) Oral Argument on Petition for Rehearing. There shall be no oral argument upon the petition for rehearing of an appeal or proceeding unless ordered by the Supreme Court.

(d) Notice of Rehearing — Briefs. Copies of an order granting or denying a rehearing shall be served by the Clerk of the Supreme Court upon all parties to the parties to the appeal or proceeding. The order may set forth the issues to be reheard, and shall direct the time and order for the filing of briefs. A brief in support of or in opposition to a petition for rehearing need not be bound nor have any colored cover.

(e) Oral Argument on Rehearing. If the Supreme Court grants a petition for rehearing, argument upon rehearing shall be scheduled by the Court in the same manner as argument on the merits of an appeal or petition. [Adopted March 25, 1977, effective July 1, 1977; amended March 20, 1985, effective July 1, 1985; amended March 28, 1986, effective July 1, 1986.]

Rule 43. Special writs. — (a) Special Writs. The Supreme Court shall process petitions for such special writs as are established by law in the manner herein provided.

(b) Petitions for Writs — Filing Fee — Briefs — Number. Special writs shall issue only upon petitions verified by the party beneficially interested therein and upon briefs in support thereof filed with the Clerk of the Supreme Court with payment of the

appropriate filing fee. No filing fee shall be required with a petition for writ of habeas corpus which is filed in connection with a criminal case or post-conviction relief proceeding. Petitioner shall file an original and six copies of the petition and brief with the Clerk of the Supreme Court.

(c) Procedure for Issuance of Writs. Special writs, except writs of habeas corpus, shall issue as herein provided. The Supreme Court acting through three (3) or more members, or by two (2) or more members when the Court is in vacation, may issue a writ directing the respondent to act in accordance with the writ, or to appear or respond at the time fixed in the writ to show cause why the relief requested in the petition should not be granted. The court may enter an order providing for briefing and oral argument prior to issuance of a writ or an order to show cause. If such an order is entered, briefing shall be conducted in the manner outlined in the order as supplemented by these rules. The briefs shall be in the form prescribed by Rule 32(e). A majority of the entire Court, may also direct the respondent to so act, or to refrain from acting, as directed in the writ, pending hearing and upon such conditions as the Court may impose. Upon its issuance, a copy of the petition, brief and writ shall immediately be served upon all affected parties including the real party in interest as concerns the requested relief, which real party must be named in the petition and the writ. Service shall be made in the manner and within the time limit set by the Court. Appearance in response to the writ by any interested party shall be by verified answer and by brief. If no appearance is made, the Court may grant any requested relief justified by the petition. If appearance is made, the Court may schedule the matter for oral argument or decide the matter on the record. Issues of fact, if ay, shall be determined in the manner ordered by the Court.

(d) Petitions for Writ of habeas Corpus. Petitions for writs of habeas corpus shall be processed as provided by law. [Adopted March 25, 1977, effective July 1, 1977; amended March 20, 1991, effective July 1, 1991.]

Rule 44. Extraordinary appellate procedure. — The Supreme Court by order may alter, shorten, or eliminate any step or procedure in the appeal from an appealable order or judgment upon finding extraordinary circumstances; provided, however, the time within which a party can file a notice of appeal, a petition for rehearing or a petition for review will not be shortened or lengthened. The decision to alter the appellate procedure and the resultant appellate opinion shall both be made by the Court en banc. [Adopted March 25, 1977, effective July 1, 1977; amended March 28, 1986, effective July 1, 1986.]

Rule 45. Withdrawal or substitution of appellate counsel. — Appellate counsel may withdraw as the attorney of record for a party in a civil or criminal appeal only by order of the Supreme Court upon motion showing good cause. Provided, substitution of counsel may be made by notice without order of the Court if such substitution does not require any pending hearing or oral argument to be vacated. [Adopted March 24, 1982, effective July 1, 1982.]

Rule 45.1 Criminal appeals — Counsel on appeal. — (a) Right of Counsel of Appeal. The determination of whether a defendant in a criminal prosecution is entitled to court appointed counsel on appeal shall first be made by the trial court upon application of the defendant, or upon the trial court's own motion, either before or after a notice of appeal has been filed. If the application is denied by the trial court, the defendant may apply to the Supreme Court for an order directing the trial court to appoint counsel. An application for counsel on appeal may be treated as a notice appeal.

(b) Trial Defense Counsel to Continue Representation on Appeal. A court appointed trial defense counsel of an indigent defendant shall continue to represent the defendant on an appeal, if any, unless granted leave to withdraw as counsel by order of the district court for good cause shown before the filing of a notice of appeal. In the event of the withdrawal of trial defense counsel, the district court shall appoint new counsel for the indigent defendant if the defendant desires to appeal. [Adopted March 24, 1982, effective July 1, 1982.]

Rule 46. Extension of time generally. — The time prescribed by these rules for any act, except the physical filing of a notice of appeal or petition for rehearing, may be enlarged by the Court or any Justice thereof for good cause shown upon the motion of a party. Applications for extensions of time for filing briefs shall also be subject to the requirements of Rule 34(e). Any motion for the extension of time to do an act must be served upon all parties, but the order enlarging the time for performance may be issued immediately and ex parte in the discretion of the Court or any Justice thereof, subject to review upon any written objection filed within seven (7) days of service of the motion. Any order of extension of time to do an act shall be served by the Clerk on all parties. [Adopted March 25, 1977, effective July 1, 1977.]

Rule 47. Service of court opinions, orders and other documents by the clerk. — The Clerk of the Supreme Court shall serve by mail, or personal service or delivery, copies of all of the following documents upon all of the parties to an appeal or proceeding as soon as the documents are filed with the Supreme Court:

(a) Certificate of Appeal.

(b) All Supreme Court orders and notices.

(c) Supreme Court opinions on appeal.

(d) Remittiturs. [Adopted March 25, 1977, effective July 1, 1977.]

Rule 48. Practice not covered by rules. — In cases where no provision is made by statute or by these rules, proceedings in the Supreme Court shall be in accordance wit the practice usually followed in such or similar cases, or as may be prescribed by the Court or a Justice thereof. [Adopted March 25, 1977, effective July 1, 1977.]

Rule 49. Appellate settlement conference. — (a) Submission for Conference. By written agreement of all parties, a civil appellate case may be submitted for consideration for an appellate settlement conference before a person appointed by the Supreme Court who shall be known as the Conference Judge. The settlement conference shall be held at a place near the court from which the case is appealed or at any other place agreed upon by the parties and the Conference Judge. The facility in which the conference is held shall be determined by the Conference Judge. In advance of the settlement conference, all parties shall deliver to the clerk of the Supreme Court, for submission to the Conference Judge, a settlement statement in a form prescribed by the Supreme Court. The settlement conference shall be scheduled by the clerk of the Supreme Court at a time convenient to all parties and the Conference Judge. The Conference Judge shall not participate in the determination of the appeal.

(b) Settlement Statement. The written settlement statement of each party, in the form prescribed by the Supreme Court, shall be

a confidential statement which shall not be filed in the case file and shall be disclosed only to the Conference Judge. In no event shall the settlement statement, or the contents thereof, be disclosed to opposing counsel, and upon conclusion of the conference negotiations, it shall be destroyed by the Conference Judge. The Conference Judge shall use the settlement statement only for the purpose of acquainting the judge with the appeal, the positions of the parties and the possibility of settlement.

(c) Settlement Conference. The settlement conference shall be an informal confidential meeting presided over by the Conference Judge. The agenda and sequence of presentations shall be in the discretion of the Conference Judge who may deliver to the parties an agenda in advance of the conference. The Conference Judge may request additional information not contained in the settlement statements. All parties to the appeal, or representatives of the parties empowered to enter into a binding settlement agreement, shall attend the settlement conference with their attorney. Provided, if the client or the client's representative is not able to be present, the attorney must be able to have immediate telephone contact with the client or the client's representative is not able to be present, the attorney must be able to have immediate telephone contact with the client or the client's representative, who has authority to approve a settlement. The attorney who will argue the case on appeal, or the attorney who represented the client in the trial of the action, shall appear at the settlement conference, but the attorneys for the parties may make written notes. The seating at the settlement conference shall be in an informal manner, preferably around a table, and the conference shall not be conducted as a formal hearing. A settlement conference may be confined from time to time by agreement of all parties and Conference Judge. The initial settlement conference, or any subsequent conference, may be held by conference telephone call when agreed upon by all parties and the Conference Judge.

(d) Role of Conference Judge. There shall be no duty upon the Conference Judge to make a recommendation for settlement of the appeal. The role of Conference Judge is to act as a mediator to assist the parties and their counsel to come to an agreement.

(e) Settlement Agreement. If the conference results in a settlement, the parties immediately will execute a settlement agreement and will file a stipulation for dismissal of the appeal with the Supreme Court.

(f) Confidentiality. The settlement conference and all documents prepared by the parties or the Conference Judge shall be confidential. Upon settlement of the appeal, or upon the determination by the Conference Judge that there can be no settlement, the Conference Judge shall destroy all records of the settlement conference including the settlement statements of the parties and the notes or other documents prepared by the Conference Judge. The Conference Judge shall not discuss the meeting with any other person and any written or oral statements made or submitted by an attorney or a party at the settlement conference shall not be admissible in evidence in any judicial proceeding for any purpose and shall not be subject to discovery. [Adopted effective October 26, 1989.]

IDAHO COURT OF APPEALS RULES

Rule 101. Rules applicable to the Idaho Court of Appeals — This Rule 101 and the following Idaho Appellate Rules are adopted specifically for and shall apply to the Idaho Court of Appeals, which is hereafter referred to as the Court of Appeals. The Idaho Appellate Rules shall apply to all proceedings in the Court of Appeals as well as the following rules. The Court of Appeals may adopt rules for its internal administration and operation subject to

the approval of the Supreme Court. [Adopted April 17, 1981, effective July 1, 1981.]

Rule 102. Idaho Court of Appeals. — The Judges of the Court of Appeals shall have resident chambers in Boise, Idaho, and shall hold sessions of court in such cities in the state of Idaho and at such times as prescribed by order of the Supreme Court. Three Judges, one or more of whom may be a judge pro tem appointed by the Supreme Court to substitute for an absent judge, shall be necessary to constitute a quorum, two of whom must concur to pronounce a decision or to render an opinion. [Adopted April 17, 1981, effective July 1, 1981.]

Rule 104. Chief Judge. — The Chief Judge of the Court of Appeals shall be appointed by the Chief Justice of the Supreme Court for a term of two (2) years. The Chief Judge shall preside over all sessions of court at which the judge is present, sign all orders of the court and shall be responsible for the management and administration of the court and its personnel subject to statutes, rules, orders, and administrative policies of the Supreme Court. The Chief Judge shall designate another judge of the court to serve as Acting Chief Judge in the absence of the Chief Judge. [Adopted April 17, 1981, effective July 1, 1981.]

Rule 106. Clerk and officers of court. — The Clerk of the Supreme Court shall be the Clerk of the Court of Appeals. [Adopted April 17, 1981, effective July 1, 1981.]

Rule 108. Assignment of Cases. — (a) Cases Reserved to Supreme Court. The Court of Appeals shall hear and decide all cases assigned to it by the Supreme Court; provided that the Supreme Court will not assign the following cases:

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(1) Proceedings invoking the original jurisdiction of the Idaho Supreme Court;

(2) Appeals from imposition of sentences of capital punishment in criminal cases;

(3) Appeals from the Industrial Commission;

(4) Appeals from the Public Utilities Commission;

(5) Review of the recommendatory orders of the Board of Commissioners of the Idaho State Bar;

(6) Review of recommendatory orders of the Judicial Council.

(b) Assignment of Cases to Court of Appeals. Generally, cases which involve consideration of existing legal principles will be assigned to the Court of Appeals. In assigning cases to the Court of Appeals, due regard will be given to the workload of each court, and to the error review and correction functions of the Court of Appeals. Ordinarily, the Supreme Court will retain the following classes of cases:

(1) Cases in which there is substantial public interest;

(2) Cases in which there are significant issues involving clarification or development of the law, or which present a question of first impression;

(3) Cases which involve a question of substantial state or federal constitutional interpretation;

(4) Cases raising a substantial question of law regarding the validity of a state statute, or of a county, city, or other local ordinance;

(5) Cases involving issues upon which there is an inconsistency in the decisions of the Court of Appeals or of the Supreme Court.

(c) Transfer of Assigned Cases. The Supreme Court may order transfer of a case from the Court of Appeals to the Supreme Court when a case concerns an issue of imperative or fundamental public importance. [Adopted April 17, 1981, effective July 1, 1981.]

Rule 110. Case filed — All motions, petitions, briefs and other appellate documents, other than the initial notice of appeal, shall be filed with the Clerk of the Supreme Court as required by the Idaho Appellate Rules with the court heading of the Supreme Court of the State of Idaho as provided by Rule 6. There shall be no separate filing directed to or filed with the Court of Appeals. In the event of an assignment of a case to the Court of Appeals, the title of the proceeding and the identifying number thereof shall not be changed except that the Clerk of the Supreme Court may add additional letters or other notations to the case number so as to identify the assignment of the case. All case files shall be maintained in the office of the Clerk of the Supreme Court. [Adopted April 17, 1981, effective July 1, 1981.]

Rule 111—Argument by telephone conference call. — Oral argument to the Court of Appeals may be held by telephone conference call of all members of the court, all attorneys for the parties and the clerk by stipulation of all parties and approval by the court. If oral argument has been held or waived by stipulation,

the court, upon finding that additional dialogue would be useful, may order argument by telephone conference call. Any argument under this rule shall follow the general format established for oral argument under Rule 37, to the extent practicable. The court may limit oral argument under this rule to particular questions or issues. The clerk shall record oral argument made by telephone conference call under this rule. [Adopted March 27, 1989, effective July 1, 1989.]

Rule 112. Determination of appeals — The Court of Appeals may reverse, affirm or modify any order or judgment appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had in the trial court. All opinions, decisions, orders and remittiturs of the Court of Appeals shall be as prescribed by the Idaho Appellate Rules. If a new trial be granted, the Court of Appeals shall pass upon and determine all questions of law involved in the case presented upon such appeal and necessary to the final determination of the case. [Adopted April 17, 1981, effective July 1, 1981.]

Rule 114. Re-transfer of case to Supreme Court. — At any time the Supreme Court may order the assignment of a case to the Court of Appeals revoked. Upon the entry of an order revoking the assignment, the Court of Appeals shall take no further action in this case. [Adopted April 17, 1981, effective July 1, 1981.]

Rule 116. Petition for rehearing before Court of Appeals. — Any party to a proceeding aggrieved by opinion or order of the Court of Appeals may thereafter petition to that court for a rehearing in the same manner, within the same time limits, upon the same grounds, and with the same effect as a petition for rehearing to the Supreme Court under the Idaho Appellate Rules.

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The determination of whether to grant the rehearing, and the determination on rehearing if granted, shall be made by the Court of Appeals. [Adopted April 17, 1981, effective July 1, 1981; amended March 24, 1982, effective July 1, 1982.]

Rule 118. Petition for review by the Supreme Court. — (a) Petition, Time for Filing, Ruling by Supreme Court. Any party to a proceeding aggrieved by opinion or order of the Court of Appeals may, within twenty-one (21) days after the announcement of the opinion or order, or after the announcement of an order denying rehearing, or after the announcement of an opinion on rehearing or a modified opinion without rehearing, physically file a petition for review with the Clerk of the Supreme Court. It is not necessary to file a petition for rehearing with the Court of Appeals before filing a petition for review under this rule. A brief in support of the petition for review must be filed with the petition or within fourteen (14) days thereafter, Such petition shall be processed within the time limits and in the manner prescribed for a petition for rehearing of a Supreme Court opinion as provided by Rule 42. There shall be no response to a petition for review, unless the Supreme Court requests a party to respond to the petition for review before granting or denying the same. The filing of a petition for review under this rule does not preclude the filing of a timely petition for rehearing under Rule 116; and no action will be taken by the Supreme Court on a petition for review until the Court of Appeals has made a final ruling upon and determination of all petitions for rehearing. If a petition for review is granted, the Supreme Court will include in its order the sequence for the filing of briefs by the parties before oral argument. A brief in support of or in opposition to a petition for review need not be bound nor have any colored cover.

(b) Criteria for Granting Petitions for Review by the Supreme

Court. Granting a petition for review from a final decision of the Court of Appeals is discretionary on the part of the Supreme Court, and will be granted only when there are special and important reasons and a majority of the Justices direct that the petition be granted. The following, while neither controlling nor fully measuring the Supreme Court's discretion, are factors that will be considered in the exercise of the Court's discretion:

(1) Whether the Court of Appeals has decided a question of substance not heretofore determined by the Supreme Court;

(2) Whether the Court of Appeals has decided a question of substance probably not in accord with applicable decisions of the Idaho Supreme Court or the United States Supreme Court;

(3) Whether the Court of Appeals has rendered a decision in conflict with a previous decision of the Court of Appeals;

(4) Whether the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such procedure by a trial court as to call for the exercise of the Supreme Court's power of supervision;

(5) Whether a majority of the judges of the Court of Appeals, after decision, certifies that the public interest or the interests of justice make desirable a further appellate review. [Adopted April 17, 1981, effective July 1, 1981; amended March 24, 1982, effective July 1, 1982; amended March 28, 1986, effective July 1, 1986; amended March 23, 1990, effective July 1, 1990.]

Rule 120. Review of decisions on initiative of Supreme — Within twenty-one (21) days after the announcement of an opinion or order of the Court of Appeals, or the announcement of an

opinion or order on rehearing or a modified opinion or order without a rehearing, the Supreme Court may, on its own motion, enter an order directing a review of the case before the Supreme Court. The entry of such an order shall constitute and have the same effect as an order granting a petition for review before the Supreme Court. [Adopted April 17, 1981, effective July 1, 1981.]

ORDER ADOPTING RULES OF CIVIL PROCEDURE

Compiler's notes. These rules, which were patterned, after the Federal Rules of Civil Procedure to the extent practicable, were originally adopted by the Idaho Supreme Court to become effective on November 1, 1958. Subsequently, the rules were amended by an order of the Supreme Court which read: "The report of the Civil Rules Advisory Committee having been submitted to the Court for the amendment of the Idaho Rules of civil Procedure and the rescission of all other rules of civil procedure now in effect, and the Court having reviewed said report, and the Court having determined that amendments to the Idaho Rules of Civil Procedure are in the best interest of the judicial system of the State of Idaho,

NOW, THERE, IT IS HEREBY ORDERED, that the Idaho Rules of Civil Procedure be, and the same are hereby amended to read as indicated in the attached copy of the Idaho Rules of Civil Procedure, as amended.

IT IS FURTHER ORDERED, that the civil rules contained in the Rules of the District Court and the District Court, adopted effective January 11, 1971, be, and the same are hereby rescinded.

IT IS FURTHER ORDERED, that the civil rules contained in the Uniform District Court Rules adopted effective January 1, 1966 be, and the same are hereby rescinded.

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IT IS FURTHER ORDERED, that the civil rules, except for rules concerning the assignment of jurisdiction to the magistrates division and the establishment of calendars and case setting procedures contained in each and all of the Local District Court Rules of the seven judicial districts be, and same are hereby, rescinded.

IT IS FURTHER ORDERED, that the Civil Appellate Rules be, and the same are hereby rescinded.

IT IS FURTHER ORDERED, that the Order Promulgating Rules of Practice and Procedure of this Court, dated September 19, 1951, declaring statutes of the state of Idaho to be rules of the Court be, and the same is hereby rescinded."

A separate order of the court provided that the Rules should become effective January 1, 1975.

IDAHO RULES OF CIVIL PROCEDURE, RULE 40(d)(1)

Rule 40(d)(1). Disqualification without cause.—In all civil actions, the parties shall each have the right to one (1) disqualification of the judge or magistrate without cause, except as herein provided, under the following conditions and procedures.

(A) Motion to Disqualify. In any action in the district court or the magistrate's division thereof, any party may disqualify one (1) judge or magistrate by filing a motion for disqualification, which shall not require the stating of any grounds therefor, and such motion for disqualification, if timely, shall be granted. A motion for disqualification shall not be made under this rule to hinder, delay or obstruct the administration of justice.

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(B) Time for Filing. A motion for disqualification without cause bust be filed not later than seven (7) days after service of a written notice or order setting the action for status conference, pretrial conference, trial or for hearing on the first contested motion, or not later than twenty-one (21) days after service or receipt of a complaint, summons, order or other pleading indicating or specifying who the presiding judge or magistrate to the action will be, whichever occurs first; and such motion must be filed before the commencement of a status conference, a pretrial conference, a contested proceeding or trial before the judge sought to be disqualified.

(C) Multiple Parties. If there are multiple parties plaintiff, defendant or otherwise, the trial court shall determine whether such co-parties have sufficient interest in common in the action so as to be required to join in a disqualification without cause, or whether such parties have an adverse interest in the action such that each adverse co-party is entitled to file one (1) motion for disqualification without cause.

(D) New Parties. If a new party is joined in an action after the time for disqualification without cause of the presiding judge or magistrate has passed, the new party shall have the right to file a motion for disqualification without cause within fourteen (14) days of the filing date of that party's first appearance or from the date when that party's first responsive pleading is due, whichever occurs first.

(E) New Judge. If at any time during the course of the proceedings, except under circumstances involving alternate judges or magistrates as set forth below in subparagraph (G), a new judge or magistrate is assigned to preside over the case, each party shall have the right to file one (1) motion for disqualification

without cause as to the new judge or magistrate, within the time limits set forth in subparagraph (B) of this Rule. Provided, if a party has previously exercised a disqualification under this Rule 40(d)(1), that party shall have no right of disqualification without cause of a new judge or magistrate under this subparagraph.

(F) Disqualification on New Trial. After a trial has been held, if a new trial has been ordered by the trial court or by an appellate court, each party may file a motion for disqualification without cause of the presiding judge or magistrate, within the time limits set forth in subparagraph (B) of this Rule.

(G) Alternate Judges or Magistrates. If a case is set for trial as a multiple trial setting and the presiding judge or magistrate intends to have a panel of judges or magistrates as alternates to try the case, the notice of multiple trial setting shall include a list of not more than three (3) judges or magistrates who may alternatively be assigned to preside at the trial if the presiding judge or magistrate is unable to try the case. Upon service of the notice as to the panel, each party shall have the right to file one (1) motion for disqualification without cause as to any alternate judge or magistrate not later than fourteen (14) days after service of written notice listing the alternate judges and magistrates who may preside at the trial of the case. Provided, if a party has previously exercised the right to disqualification without cause under this Rule 40(d)(1), that party shall have no right to disqualify an alternate judge or magistrate under this subparagraph.

(H) Service on Judge. A party moving to disqualify a judge or magistrate under this Rule 40(d)(1) shall mail a copy of the motion for disqualification to the presiding judge or magistrate at the judge's resident chambers.

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(I) Exceptions. Notwithstanding the above provisions, the right to disqualification without cause shall not apply to:

(i) A judge when acting in an appellate capacity;

(ii) A judge or magistrate in a post-conviction proceeding, when that proceeding has been assigned to the judge or magistrate who entered the judgment of conviction or sentence being challenged by the post-conviction proceeding.

(iii) A judge or magistrate who has been appointed by the Supreme Court to preside over a specific civil action. [Adopted June 15, 1987, effective November 1, 1987; amended March 23, 1990, effective July 1, 1990; amended March 20,1991, effective July 1, 1991; amended May 3, 1991, effective July 1, 1991; amended March 26, 1992, effective July 1, 1992.]

Rule 40(d)(2). Disqualification for cause. — (A) Grounds. Any party to an action may disqualify a judge or magistrate for cause from presiding in any action upon any of the following grounds:

1. That the judge or magistrate is a party, or is interested, in the action or proceeding.

2. That the judge or magistrate is related to either party by consanguinity or affinity within the third degree, computed according to the rules of law.

3. That the judge or magistrate has been attorney or counsel for any party in the action or proceeding.

4. That the judge or magistrate is biased or prejudiced for or against any party or the case in the action.

(B). Motion for Disqualification. Any such disqualification for cause shall be made by a motion to disqualify accompanied by an affidavit of the party or the party's attorney stating distinctly the grounds upon which disqualification is based and the facts relied upon in support of the motion. Such motion for disqualification for cause may be made at any time. The presiding judge or magistrate sought to be disqualified shall grant or deny the motion for disqualification upon notice and hearing in the manner prescribed by these rules for motions. [Adopted June 15, 1987, effective November 1, 1987.]

Rule 40(d)(4). Voluntary disqualification.—This rule shall not prevent any presiding judge in an action from making a voluntary disqualification without stating any reason therefore. [Amended December 19, 1975 effective January 1, 1976.]

Rule 40(d)(5). Disqualification and assignment of new judge. — Upon the filing of a motion for disqualification, the presiding judge shall be without authority to act further in such action except to grant or deny such motion for disqualification. Upon disqualification of a judge for any reason, the administrative judge of the judicial district, or designee, shall appoint any other qualified judge in the state to act or preside in the action. In lieu of such direct appointment procedure, the administrative district judge, or designee, may make application to the Supreme Court for appointment of a new judge to preside in the action.

Appendix U

CODE OF JUDICIAL CONDUCT

PREFACE

This Code of Judicial Conduct is adopted and promulgated in order to guide and govern the conduct of judges at all levels of the judicial system in the State of Idaho. In some aspects it substantially parallels portions of the Code of Judicial Conduct adopted by the American Bar Association. In other aspects it differs from that code in specifically defining both prescribed and required judicial conduct. Departure from the ABA Code is deemed desirable since Idaho judges, as contrasted with judges in other jurisdictions, may be subject to discipline, involuntary retirement or removal for violation of these standards. Idaho's non-partisan system of judicial selection also makes portions of the ABA Code inapplicable.

CANON 1

An independent and honorable judiciary is indispensable to justice in our society. Judges should participate in establishing, maintaining, and enforcing, and shall observe high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of the Code shall be construed and applied to further that objective. For the purpose of the Code, the term judge includes Justices of the Supreme Court and judges of the Court of Appeals, district judges and magistrate judges.

CANON 2

A. Judges should respect and comply with the law and should conduct themselves at all times in a matter that does not detract from public confidence in the integrity and impartiality of the judiciary.

B. Judges should not allow their family, social, or other relationships to influence their judicial conduct or judgment. Judges shall not lend the prestige of their office to advance the private interest of others; nor should judges convey or permit others to convey the impression that they are in a special position to influence the court. Except in a proceeding involving the judge personally or in response to an official summons, Judges shall not testify as a witness in any court proceeding.

CANON 3

The official duties of judges take precedence over all their other activities. In the performance of these duties, the following standards apply:

A. Adjudicative Responsibilities.

1. Judges should be faithful to the law and maintain professional competence in it. Judges should be unswayed by partisan interests, public clamor, or fear of criticism.

2. Judges should maintain order and decorum in proceedings before them.

3. Judges should be patient dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom they deal in their official capacity, and should require similar conduct of lawyers, and of their staff, court officials, and others subject to their direction and control.

4. Judges should accord to all persons who are legally interested in a proceeding, or their lawyers, full right to be heard according to law, and, except as administrative responsibilities dictate, should not initiate *ex parte* communications concerning a pending or impending proceeding. Judges shall not solicit the advice of any person, except from court or judicial personnel regarding proceedings before them unless the judge gives notice to the parties and affords them an opportunity to respond.

5. Judges should determine expeditiously matters submitted to them and insist that court personnel, litigants and lawyers cooperate with them to that end.

6. Judges should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to their direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. "Court personnel" as used in their Canon does not include the lawyers in a proceeding before Judges.

7. Judges shall comply with any rule promulgated by the Supreme Court regarding the broadcasting, televising, recording or taking of photographs in the courtroom or of courtroom proceedings.

B. Administrative Responsibilities.

1. Judges should diligently discharge their administrative responsibilities and facilitate the performance of the

administrative responsibilities of other judges and court officials.

2. Judges should require their court personnel subject to their direction and control to observe the standards of fidelity and diligence that apply to them.

3. Judges are encouraged to bring instances of unprofessional conduct by judges or lawyers to their attention in order to provide them opportunities to correct their errors without disciplinary proceedings; but the judges should file reports thereof with the Commissioners of the Idaho State Bar or with the Judicial Council, as appropriate, when no such remedial action is promptly undertaken, or if the violations are flagrant or repeated.

4. Judges should not make unnecessary appointments. Judges should exercise their power of appointment only on the basis of merit, avoiding nepotism and favoritism. Judges should not approve compensation of appointees beyond the fair value of services rendered.

C. Disqualification.

1. Judges should disqualify themselves in proceedings in which impartiality might reasonably be questioned or where personal knowledge of disputed evidentiary facts might reasonably affect their impartiality in the proceeding. Judges shall disqualify themselves in instances where:

   a. they have a personal bias or prejudice concerning a party, or the party's attorney;

b. they served as lawyer in the matter of controversy, or a lawyer with whom they previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

c. they know that they, individually or as a fiduciary, or their spouse or minor children residing in their household, has a financial interest in the subject matter in controversy, in a party to the proceeding, or any other interest, that could be substantially affected by the outcome of the proceeding;

d. thejudge and the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) is to the judge's knowledge likely to be material witness in the proceeding.

2. Judges should inform themselves about their personal and fiduciary financial interests, and make a reasonable effort to inform themselves about the personal financial interests of their spouse and minor children residing in

their household.

3. For the purposes of this section:

   a. the degree of relationship is calculated according to the laws of the State of Idaho;

   b. "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

   c. "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

      (i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management field of the fund;

      (ii) an office in an educational, religious, charitable, fraternal, or civil organization is not a "financial interest" in securities held by the organization;

      (iii) the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding should substantially affect the value of the interest;

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

d. the fact that a lawyer in a proceeding is affiliated with a law firm with which a lawyer-relative of the judge is affiliated does not of itself disqualify the judge.

D. Remittal of Disqualification. Judges disqualified by the terms of Canon 3C 1c or Canon 3C 1d may, instead of withdrawing from the proceeding disclose on the record the basis of their disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing that the judge's relationship is immaterial or that the judge's financial interest is insubstantial, the judge is no longer disqualified, and may participate in the proceeding, the agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding. When a party is not immediately available, the judge without violating this section may proceed on the written assurance of the lawyer that his party's consent will be subsequently filed.

CANON 4

Subject to the proper performance of their judicial duties, judges may engage in activities to improve the law, the legal system, and the administration of justice if in doing so the judges do not cast doubt on their capacity to decide impartially any issue that may come before them.

Appendix U

CANON 5

A. Judges should regulate their non-official activities to minimize the risk of conflict with their official duties.

B. Civil and Charitable Activities. Judges may participate in civil and charitable activities that do not reflect adversely upon their impartiality or interfere with the performance of their official duties. Judges may serve as officers, directors, trustees, or non-legal advisors of educational, religious, charitable, fraternal, or civil organization not conducted for the economic or political advantage of its members, subject to the following limitations:

1. Judges should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be regularly engaged in adversary proceedings in any court.

2. Judges should not solicit funds for any educational, religious, charitable, fraternal, or civil organization, or use or permit the use of the prestige of their office for that purpose, but they may be listed as officers, directors, or trustees of such organizations. They should not be a speaker or the guest of honor at an organization's fund raising events but they may attend such events.

3. Judges should not give investment advice to such an organization, but they may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.

C. Financial Activities.

Appendix U

1. Judges should refrain from financial and business dealings that tend to reflect adversely on their impartiality, interfere with the proper performance of their official duties, exploit their judicial position, or involve them in frequent transactions with lawyers or persons likely to come before the court on which they serve.

2. Subject to the requirements of subsection 1, judges may hold and manage investments, including real estate, and engage in other remunerative activity including the operation of a business, but should not serve as officers, directors, managers, advisors, or employees of any bank, public utility, insurance company, collection agency or title company.

3. Judges should manage their investments and other financial interests to minimize the number of cases in which they are disqualified. As soon as they can do so without serious financial detriment, they should divest themselves of investments and other financial interests that might require frequent disqualification.

4. Judges shall not accept gifts or loans when such is tendered by persons, corporations, organizations or entities of any type which may influence or tend to influence any mater which is or may come before their court, or which would not be tendered except by reason of their official capacity except as provided by law.

5. Information acquired by judges in their judicial capacity, except those matters of public record, should not be used or disclosed by them in financial dealings or for any other purpose not related to their judicial duties.

D. Fiduciary Activities. Judges should not serve as executors, administrators, trustees, guardians, or other fiduciaries, except as provided by law, or except for a family member's estate or trust and then only if such service will not interfere with the proper performance of their judicial duties. "Family members" include spouses, children, grandchildren, parents, grandparents, or other relatives or persons with whom the judge maintains a close familial relationship. As a family fiduciary judges are subject to the following restrictions:

1. Judges should not serve is it is likely that as fiduciaries they will be engaged in proceedings that would ordinarily come before them, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which they serve or one under its appellate jurisdiction.

2. While acting as a fiduciary judges are subject to the same restrictions on financial activities that apply to them in their personal capacity.

E. Judges shall not practice law.

F. Judges should not accept appointment to governmental committees, commissions, or other position when such appointment could reflect adversely upon their impartiality or interfere with the performance of their judicial duties.

CANON 6

Judges may receive compensation and reimbursement of expenses for the non-official activities permitted by this Code, if the source and amount of such payments does not give the appearance of influencing the judges in their judicial duties or otherwise give the

appearance of impropriety.

CANON 7

A. Political conduct in General. Judges, or candidates for election to judicial office, shall refrain from political activities inappropriate to the judicial office. Judges, or candidates, shall not act as leaders or office holders in any political organizations or for candidates, or publicly endorse candidates for any political office. Judges, or candidates, shall not make speeches for political organizations or candidates or publicly endorse candidates for any political office. Judges, or candidates, shall not either directly or indirectly solicit funds for any political organizations or candidates, except funds for their own judicial campaign. Any candidate elected to judicial office shall be subject to disciplinary proceedings or removal for violation of this Canon. Judges shall not seek elective office, except when they seek judicial office, without either:

1. resigning their judicial office when they become a candidate, or;

2. obtaining a leave of absence without pay from their judicial office in accordance with the laws of the State of Idaho.

CANON 8

A. Judges shall upon order of the Supreme Court furnish the Court with such financial information as such order shall require.

Appendix U

B. Judges shall upon order of the Supreme Court furnish the Court with medical reports and information as to their physical or mental condition as such order shall require.

COMPLIANCE WITH THE CODE OF JUDICIAL CONDUCT

All judges shall comply with the Code except as provided below:

A. Judge Pro Tempore. Judges pro tempore are persons who are appointed to act temporarily as Judges.

1. Judges *pro tempore* are not required to comply with Canons 5C 2 and 3, 5D, 5E and 5F.

2. Persons who have been judges *pro tempore* should not act as lawyers in proceedings in which they have served as judges or in any other proceeding related thereto.

B. Retired Judges. Retired judges who are recalled to act temporarily as judges should comply with all the provisions of their Code except Canons 5C 2 and 3, 5D, 5E and 5F, but they should refrain from the practice of law during the period of their service as judges. Persons who have been recalled to act temporarily as judges should not act as lawyers in proceedings in which they have served as judges or in any other proceeding related thereto.

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No. 93-454

In The

Supreme Court of the United States

October Term, 1993

LOUISIANA-PACIFIC CORPORATION,

Petitioner,

vs.

BURTON BAKER,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Idaho

BRIEF IN OPPOSITION

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Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Idaho

BRIEF IN OPPOSITION

The Respondent, Burton Baker, respectfully prays that the Petition for Writ of Certiorari filed by Petitioner to review the Opinion and Judgment of the Supreme Court of the State of Idaho entered in this matter be denied.

OPINIONS BELOW

The Petition for Writ of Certiorari correctly recites the decisions delivered in the proceedings below.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

1. Constitution of the United States, Amendment 14:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; . . .

2. 28 U.S.C. § 2111:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

3. Constitution of the State of Idaho, Article V, § 9:

> On appeal from orders of the industrial accident board the court shall be limited to a review of questions of law.

4. Idaho Rules of Civil Procedure, Rule 7(b)(3):

> Briefs and arguments on motions. It shall not be necessary to file a brief or memorandum of law in support of a motion, but the moving party must indicate upon the face of the motion whether he desires to present oral argument or file a brief within 14 days with the court in support of the motion. If the moving party does not request oral argument upon the motion . . . the court may deny such motion without notice if the court deems the motion has no merit.

5. Idaho Rules of Civil Procedure, Rule 40(d)(2):

> Disqualification for Cause – (A) Grounds. Any party to an action may disqualify a judge or magistrate for cause from presiding in any action upon any of the following grounds:
>
> 1. That the judge or magistrate is a party, or is interested in the action or proceeding.
>
> 2. That the judge or magistrate is related to either party by consanginuity or affinity within the third degree, computed according to the rules of the law.
>
> 3. That the judge or magistrate has been attorney of counsel for any party in the action or proceeding.
>
> 4. That the judge or magistrate is biased or prejudiced for or against any party or the case in the action.
>
> (B). Motion for Disqualification. Any such disqualification for cause shall be made by a motion to disqualify accompanied by an affidavit of the party or the party's attorney stating distinctly the grounds upon which disqualification is based and the facts relied upon in support of the motion. Such motion for disqualification for cause may be made at any time. The presiding judge or magistrate sought to be disqualified shall grant or deny the motion for disqualification upon notice and hearing in the manner prescribed by these rules for motions.

STATEMENT OF THE CASE

The Idaho Worker's Compensation Act, Title 72, Idaho Code, authorizes the Industrial Commission of the State of Idaho to decide cases involving working people who are hurt on the job. The Industrial Commission of the State of Idaho factually determined that Burton Baker had a 35% disability of the whole person when he sustained multiple fractures in his wrists while working for Louisiana-Pacific Corporation.

Burton Baker was a saw mill worker most of his adult life. On October 21, 1982, while working for Petitioner Louisiana-Pacific Corporation, Burton Baker suffered an on-the-job injury. He was attempting to adjust fire hoses when he fell approximately 8 to 10 feet and landed on a concrete floor. Both wrists hit the concrete floor first. His chin and knees then hit the floor. Both wrists were broken. X-rays of the right forearm revealed a comminuted fracture of the distal radial shaft extending into the articular surface of the fragment. X-rays of the left wrist revealed a non-displaced fracture into the distal radial metaphysis, with a vertical oriented lucency in the lateral aspect.

Burton Baker was hospitalized after the injury. Casts were applied on both arms for three months. Burton Baker voluntarily returned to work without pay in order to exercise his arm. Within six months of the accident he returned to full time work at his former job with Louisiana-Pacific Corporation.

Burton Baker's union went on strike on June 27, 1983. Burton Baker did not cross the picket line. Because he did not cross the picket line, Louisiana-Pacific Corporation

terminated Burton Baker's employment. In April of 1984, Burton Baker began working for the United States Forest Service at a rate of pay which was substantially less than what he received while working for Louisiana-Pacific Corporation.

Burton Baker had long term physical problems because arthritis involved both arms. He was unable to physically do many of the same activities he was capable of doing before he sustained the fractures in his wrists.

After the Industrial Commission of the State of Idaho factually determined that Burton Baker sustained a 35% disability, Petitioner Louisiana-Pacific Corporation filed an appeal to the Idaho Supreme Court. On appeal, in a unanimous decision, the Idaho Supreme Court stated that the evaluation of evidence is left to the sound discretion of the Industrial Commission and that it would not "second-guess" the commission's determination. The Idaho Supreme Court ruled that there was substantial evidence to support the commission's finding of a 35% permanent disability. The Idaho Supreme Court determined that Louisiana-Pacific Corporation's appeal was frivolous and awarded attorney's fees against it because Louisiana-Pacific Corporation's arguments were nothing more than efforts to have the Court reweigh the evidence on appeal.

After receipt of the decision, the Petitioner Louisiana-Pacific Corporation filed a Petition for Rehearing and a Motion to Recuse the Author of the Opinion, Justice Bistline. Both the petition and motion were denied by the Idaho Supreme Court.

ARGUMENT

I

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE ISSUES RAISED BY LOUISIANA-PACIFIC CORPORATION DO NOT JUSTIFY THE GRANTING OF A WRIT OF CERTIORARI.

Rule 10.1 of the Rules of the United States Supreme Court specifies that a petition for a writ of certiorari should be granted only when there are special and important reasons. Rule 10.1 (a) is inapplicable because this is not an appeal from a decision from the United States court of appeals. The cases cited by Louisiana-Pacific Corporation do not support review of the decision of the Idaho Supreme Court based upon the grounds set forth in Rule 10.1 (b) and (c) of the Rules of the United States Supreme Court. The issues raised by Louisiana-Pacific Corporation are not of such importance so as to require review by the United States Supreme Court.

Respondent Burton Baker respectfully requests that the petition be denied. Alternatively, Respondent requests that the United States Supreme Court issue a summary affirmance or a dismissal for want of a substantial federal question. Rule 16.1, Rules of the United States Supreme Court; *Hicks v. Miranda*, 422 U.S. 332 (1975).

II

BIAS AND PREJUDICE AGAINST LOUISIANA-PACIFIC CORPORATION WHICH WOULD INTERFERE WITH THE RIGHT TO A FAIR HEARING WITHIN THE MEANING OF THE FOURTEENTH AMENDMENT DID NOT OCCUR.

Petitioner argues that because an Idaho Supreme Court Justice utilized the term "scab" in a footnote of a decision, it did not receive fair consideration and was denied due process.

A. Justice Bistline Was Not Expressing Personal Bias When He Discussed a "Scab" Laborer in the Footnote.

The Petitioner has taken the term "scab" out of context in arguing that the phrase exhibits bias and prejudice on the part of the Idaho Supreme Court. The footnote, in its full context, related to whether or not Burton Baker should be denied all compensation for his permanent injury because he refused to cross a picket line in 1983. Louisiana-Pacific Corporation argued that because Burton Baker did not cross the picket line he refused "suitable" work and should not receive any compensation. Both the Industrial Commission and the Idaho Supreme Court rejected this argument urged by Louisiana-Pacific Corporation.

The full footnote reads:

> "1. Furthermore, in the author's opinion, Louisiana Pacific did not offer Baker a 'suitable job' within the meaning of the statute, being that the job offer was contingent on Baker crossing a

> picket line and thereafter becoming that lowly form of life aptly known as a 'scab' laborer."

When one examines the full context of the footnote, Justice Bistline was of the opinion that Burton Baker should not be denied compensation for his permanent injury since Louisiana-Pacific did not offer Burton Baker a "suitable job." The job offer to Burton Baker was contingent on Burton Baker becoming a "scab" laborer. Thus, the logical interpretation of the language is that an individual need not cross a picket line and become a scab laborer in order to receive compensation benefits for a permanent injury. Justice Bistline succinctly stated the view held by many people in Bonners Ferry, Idaho, in 1983 about scab laborers. If Burton Baker crossed the picket line and became a "scab," he would be subjected to ridicule, loss of friendship, loss of other job possibilities, and possibly even persecution, situations that are not condoned by any judicial body. The statement did not demonstrate any bias *against* Louisiana-Pacific Corporation.

B. In the Alternative, Regardless of a Finding of Any Personal Bias on the Part of Justice Bistline, Such Bias Did Not Rise to the Level that Would Require a Recusal.

In *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), the Court defined the type of bias that would *not* result in disqualification. In *Aetna*, the petitioner sought to disqualify a judge for his general hostility towards insurance companies. Although the justice was eventually disqualified because it was found he had a direct interest in the outcome, the Court stated that bias, based

solely on a general hostility towards insurance companies, falls well below the level that would constitutionally require disqualification. *Aetna*, 475 U.S. at 821. The Court went on to state, "Appellant's allegations of bias and prejudice on this general basis, however, are insufficient to establish any constitutional violation." *Id.* at 821.

If any bias is exhibited in the footnote, it is a general bias which is not directed at Louisiana-Pacific Corporation. There is no demonstration of any bias towards any party throughout the proceedings.

The rule adopted by the Idaho Court that deals with the disqualification of a judge or magistrate for cause is Rule 40(d)(2) of the Idaho Rules of Civil Procedure. Therein, it states that the Judge must be "biased or prejudiced for or against any party or the case in the action." A general bias against scab laborers, if at all, did not rise to the level that would constitutionally require a recusal of Justice Bistline.

The Idaho Supreme Court already considered this issue when it determined not to grant a rehearing to Louisiana-Pacific Corporation. The Petitioner and Respondent submitted briefs on the recusal issue, and the issue was decided as a matter of state law by not granting the petition for a rehearing.

III

THE IDAHO SUPREME COURT DID NOT MAKE A "FINDING OF FACT" THAT WOULD VIOLATE ARTICLE V, SECTION 9 OF THE IDAHO CONSTITUTION.

The Petitioner is correct when it states that the Industrial Commission is to be the fact finder in a worker's compensation claim. *Nelson v. Pumnea*, 106 Idaho 48, 675 P.2d 27 (1983).

The Petitioner alleges that the determination that Burton Baker was not partially disabled at the time he refused to cross the picket line was a finding of fact. A review of the record shows that the Court merely restated the facts provided to the Industrial Commission. In its Findings of Fact, Conclusions of Law, and Proposed Order, the Commission stated that Dr. Hill, the only doctor who examined Burton Baker at the time he refused to cross the picket line, "was of the opinion that Claimant's arms were fine and he could do anything he wished." There is no other medical evidence presented in the record concerning impairment or disability at the time Burton Baker refused to cross the picket line. As stated in *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 74 P.2d 171 (1937):

> "The rule applicable to all witnesses, whether parties or interested in the event of an action, is, that either a board, court, or jury must accept as true the positive uncontradicted testimony of a credible witness, unless his testimony is inherently improbable, or rendered so by facts and circumstances disclosed at the hearing or trial. *Manley v. Harvey Lumber Co.*, 175 Minn. 489, 221 N.W. 913, 914. In *Jeffrey v. Trouse*, 100 Mont. 538,

> 50 P.2d 872, 874, it is held that neither the trial court nor a jury may arbitrarily or capriciously disregard the testimony of a witness unimpeached by any of the modes known to the law, if such testimony does not exceed probability. And in *Arundel v. Turk*, 16 Cal.App.2d 293, 60 P.2d 486, 487, 488, the rule is stated thus; 'Testimony which is inherently improbable may be disregarded, . . . but to warrant such action there must exist either a physical impossibility of the evidence being true, or its falsity must be apparent, without any resort to inferences or deductions.' " 74 P.2d 171 at 175.

Thus, in this case, the Court did nothing more than restate what the Industrial Commission found to be fact and which was uncontroverted. That evidence showed Burton Baker was not partially disabled at the time he refused to cross the picket line.

This issue was also considered by the Idaho Supreme Court in the petition for rehearing made by Louisiana-Pacific. By not granting the petition, the Court made the determination that they did not err in interpreting Article V, Section 9 of the Idaho Constitution.

IV

THE IDAHO SUPREME COURT'S DECISION NOT TO PROVIDE ORAL ARGUMENT ON LOUISIANA-PACIFIC CORPORATION'S MOTION TO RECUSE JUSTICE BISTLINE WAS NOT ERROR AND WAS NOT A DENIAL OF DUE PROCESS.

Louisiana-Pacific Corporation alleges that notice and an oral hearing were required before deciding a motion for recusal. Because no hearing occurred, it alleges it was

denied due process. The applicable Rule is Rule 40(d)(2)(B) of the Idaho Rules of Civil Procedure. Rule 40(d)(2)(B) states:

> "(B). Motion for Disqualification. Any such disqualification for cause shall be made by a motion to disqualify accompanied by an affidavit of the party or his attorney stating distinctly the grounds upon which disqualification is based and the facts relied upon in support of the motion. Such motion for disqualification for cause may be made at any time. The presiding judge or magistrate sought to be disqualified shall grant or deny the motion for disqualification upon notice and hearing in the manner prescribed by these rules for motions." I.R.C.P. 40(d)(2)(B).

The relevant language of the rule is embodied in the last sentence: ". . . in the manner prescribed by these rules for motions." In order to determine whether notice and a hearing are required, it is imperative that the "manner prescribed by these rules" be examined. Rule 7(b)(3) provides the prescribed manner.

> "Briefs and arguments on motions. It shall not be necessary to file a brief or memorandum of law in support of a motion, but the moving party must indicate upon the fact of the motion whether he desires to present oral argument or file a brief within 14 days with the court in support of the motion. If the moving party does not request oral argument upon the motion . . . the court may deny such motion without notice if the court deems the motion has no merit." I.R.C.P. 7(b)(3).

In order to insure that a hearing will be held on the motion, the moving party must indicate on the face of the motion that he would like to present oral argument. Here, there was no such request on the face of the motion to disqualify Justice Bistline. The underlying purpose of giving notice of hearing on motions is to protect the non-moving party by giving the non-moving party the right to be heard. Here, both parties submitted briefs either in support or in opposition to the motion. The decision to deny the motion was based upon the arguments in the briefs. Because both parties had the opportunity to be heard, there was no violation of due process rights due to the lack of notice or because oral argument was not presented.

The Petitioner also contends that the Idaho Supreme Court erred by issuing an order which simultaneously decided the petition for rehearing and the motion for recusal.

The Petitioner makes an assumption that Justice Bistline participated in the deliberations regarding the petition for rehearing, an assumption that is not warranted from the record. Petitioner states in its brief that nothing in the record shows how the decision on Louisiana-Pacific Corporation's petition for rehearing was resolved. However, the order is signed solely by Chief Justice McDevitt. Nonetheless, Petitioner asserts that because the order denying the petition did not state that Justice Bistline did not participate, it can only be presumed that he did.

Such an assumption is not reasonable. In *Aetna Life Insurance v. Lavoie*, 475 U.S. at 820, it was stated that a

presumption of impartiality will be given to judges that have been sworn to administer justice.

Where no facts are provided to support a contention that a judge was involved in any type of wrongdoing, (no matter how minimal) the presumption acts in his favor when he is being accused of acting contrary to the prescribed rules. Within the order denying the petition for rehearing, it is unclear whether Justice Bistline was involved in the decision or in the deliberations. The presumption of impartiality should operate in his favor.

Regardless of whether Justice Bistline was involved in deciding to deny the request for a rehearing submitted by the Petitioner, at most, such involvement would have to be considered harmless error.

Since the early part of the century, courts and legislatures have retreated from allowing a losing party to receive a grant of a new trial or a reversal on the basis of some mere technical error. The result has been the creation of many state and federal statutes and rules of procedure similar to 28 U.S.C. § 2111.

28 U.S.C. § 2111, the federal harmless error statute, provides:

> "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

Justice Brennan, in his concurring opinion in *U.S. v. Lane*, 474 U.S. 438 (1986), defined what would constitute

"affecting substantial rights." ". . . an error 'affects substantial rights' only if it casts doubt on the outcome of the proceeding." *Id.* at 735.

In the case at bar, the Idaho Supreme Court unanimously found that the evidence was so overwhelmingly in favor of Burton Baker that it ordered Louisiana-Pacific Corporation to pay his attorney's fees for the appeal due to the frivolous nature of the appeal. The Idaho Supreme Court determined that Louisiana-Pacific Corporation's appeal had no merit. To grant certiorari based on an alleged procedural error of simultaneously deciding the motion to recuse Justice Bistline at the same time the Court denied the motion for rehearing would not only result in gross injustice for Burton Baker, but would also constitute a great waste of judicial resources. This Court has greater obligations and responsibilities than rehearing frivolous claims.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari to review the Opinion and Judgment of the Supreme Court of the State of Idaho should be denied.

Respectfully submitted,

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Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Idaho

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AUTHORITY FOR REPLY

Respondent Baker argues that one of the controlling authorities on whether Louisiana-Pacific (L-P) is entitled to notice and a hearing on its Motion to Recuse is Idaho Rules of Civil Procedure, Rule 7(b)(3). This argument was raised for the first time in the Respondent's Brief in Opposition to Writ of Certiorari. It was not raised in L-P's Petition for Writ of Certiorari, nor was it cited as an authority by the Idaho Supreme Court or raised by either party in any of the proceedings below. This reply brief is therefore submitted pursuant to U.S. Supreme Court Rule 15.6.

ARGUMENT

Respondent Baker's brief in opposition references "oral argument" and an "oral hearing" (Brief in Opposition to Petition for Writ of Certiorari, at IV, p. 11), and then refers this Court for the first time in this proceeding to Idaho Rules of Civil Procedure, Rule 7(b)(3) as support for his argument that no hearing was required. Rule 7(b)(3) provides:

> **Briefs and arguments on motions.** - It shall not be necessary to file a brief or memorandum of law in support of a motion, but the moving party must indicate upon the face of the motion whether the party desires to present oral argument or file a brief within 14 days with the court in support of the motion. If the moving party does not request oral argument upon the motion, and does not file a brief within 14 days, the court may deny such motion without notice if the court deems the motion has no merit. If argument has been requested on any motion, the court may, in its discretion, deny oral argument by counsel by written or oral

> notice to all counsel before the day of the hearing, and the court may limit oral argument at any time.

The Respondent's argument that Rule 7(b)(3) governs the issue of the denial of L-P's right to notice and hearing is an erroneous statement of Idaho law.

The Respondent does acknowledge that Idaho Rules of Civil Procedure, Rule 40(d)(2)(B) is the rule applicable to Motions for Disqualification. Rule 40(d)(2)(B) provides:

> Motion for Disqualification. Any such disqualification for cause shall be made by a motion to disqualify accompanied by an affidavit of the party or his attorney stating distinctly the grounds upon which disqualification is based and the facts relied upon in support of the motion. Such motion for disqualification for cause may be made at any time. The presiding judge or magistrate sought to be disqualified shall grant or deny the motion for disqualification upon notice and hearing in the manner prescribed by these rules for motions.

The Respondent, however, argues that a judge whose disqualification is sought, on the grounds of bias and prejudice, should first determine whether notice and hearing are required, and that the judge is to make this determination "in the manner prescribed by these rules for motions." I.R.C.P. 40(d)(2)(B). According to the Respondent, Idaho Rules of Civil Procedure, Rule 7(b)(3) describes how to determine *whether* notice and hearing are *required*. This prepositional phrase, however, tells us *how* the required notice shall be given and the hearing held, and not *whether* they are required.

The Respondent's argument flies in the face of statutory construction, proper English grammar, and due process. The Respondent reads the prepositional phrase "in the manner prescribed by these rules for motions" independently from the rest of the sentence. General rules of statutory construction provide that statutes and rules are read in their entirety, and may not be dissected to create new meaning. Proper English grammar also militates against the Respondent's reading of Rule 40(d)(2)(B). The prepositional phrase "in the manner prescribed by these rules for motions" modifies the prepositional phrase immediately preceding it "upon notice and hearing". This prepositional phrase in turn modifies the dependant clause "the presiding judge or magistrate sought to be disqualified *shall* grant or deny the motion for disqualification". (Emphasis added). Read properly then, the phrase "in a manner prescribed by these rules" means that the *notice* and *hearing* shall be provided and held in accordance to the Idaho Rules of Civil Procedure.

Due process also mandates that notice and hearing be provided. Rule 40(d)(2) was adopted by the Idaho Supreme Court on November 1, 1987. Prior to this adoption, disqualification was done pursuant to Idaho Code §R1-1801 which provided:

> Upon the filing of an affidavit of prejudice . . . the presiding judge is automatically disqualified. *The filing of such an affidavit is sufficient to disqualify the judge without any hearing on his truth or falsity* and regardless of whether he is actually prejudiced as a matter of fact.

(Emphasis added). *State v. Ash,* 94 Idaho 542, 493 P.2d 701, 704 (1972). Rule 40(d)(2) provides that, rather than the prior practice of automatic disqualification upon the filing of an affidavit, before a decision is made on disqualification, notice *shall* be given and a

hearing held to determine the truth or falsity of the allegations contained in the complaint and to make and enter a determination of a finding of fact as to bias and prejudice. The hearing on the truth or falsity of the affidavit of prejudice that is not required under the prior law (see *State v. Ash, supra.*), is exactly what is required under the new rule. In other words, a trade-off occurred and automatic disqualification was eliminated in favor of disqualification only after notice and a hearing into the truth or falsity of the affidavit of prejudice.

Finally, even if Respondent Baker's arguments are accepted and Rule 7(b)(3) is deemed to be controlling, by this Rule's expressed terms, a motion can be denied only without notice if the Court deems the motion has no merit. As a matter of law, a motion to disqualify meets its prima facie burden and has merit when supported by an affidavit of prejudice, as was done in this case. Certainly, if the old statutory law provided that the mere filing of an affidavit of prejudice was sufficient to *automatically* disqualify the judge, the filing of an affidavit of prejudice, under the new rule, Rule 40 (d)(2)(B), is sufficient to meet a prima facie claim of bias and prejudice. As a matter of law, L-P's motion cannot be without merit. In fact, L-P's Motion to Recuse was not found to be without merit; it was merely denied. We do not know if the Idaho Supreme Court found L-P's motion to have merit, but not dispositive, as the Court was silent on the basis for its ruling.

As the Court in *Wolff v. McDonnell*, 418 U.S. 539, 550, stated: "[t]he touchstone of due process is protection of the individual against arbitrary action of government." The scenario suggested by the Respondent is precisely the type of arbitrary governmental action that due process was intended to prevent. If the Respondent's position is accepted, the judiciary would condone a judge who is faced with a motion to recuse supported by an affidavit of prejudice, denying the motion without a stated basis, comment, or any acknowledgement whatsoever. Such a situation

was faced by L-P in the present case. How could any moving party react in any way other than with shock, disbelief, and disillusionment. Challenging a judge's impartiality is done only after rigorous consideration. Having made the decision to so challenge, and then receiving virtually no response, a party justifiably would be left with the belief that its concern about such a fundamental right had not been seriously considered, and that it had not received justice.

Respectfully submitted,

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